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021567 APR 24 2003

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IN THE SUPREME COURT OF THE UNITED STATES

RICHARD MORGAN, SUPERINTENDENT,

Petitioner,

v.

BLAKE PIRTLE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

This case involves a double murder in which the defendant claimed he was unable to premeditate the crime due to a drug induced temporal lobe seizure, or "explosive dyscontrol." The evidence presented at trial indicated that the defendant's chronic drug abuse made him susceptible to such seizures, and that his acute drug usage in the hours before the murders induced a temporal lobe seizure at the precise time of the murders.

1. Does an attorney in such a case provide ineffective assistance of counsel by requesting a jury instruction on the defense of voluntary intoxication rather than diminished capacity?

2. If the defendant claims counsel provided ineffective assistance, is he entitled to relief from his conviction in the absence of a showing that the voluntary intoxication instruction by itself so infected the trial that the resulting conviction violates due process?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the Superintendent of the Washington State Penitentiary, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 313 F.3d 1160 (9th Cir. 2002) and appears in the Appendix at App. 1a through 45a. The opinion of the district court is reported at 150 F. Supp. 2d 1078 (E.D. Wash. 2001) and appears in the Appendix at App. 49a through 116a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 19, 2002. App. 1a. On January 24, 2003, the Court of Appeals denied Petitioner's petition for rehearing en banc. App. 47a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

STATEMENT

1. Facts of the Crime and Pirtle's Trial

On May 17, 1992, Respondent Blake Pirtle brutally murdered two former co-workers, Tod Folsom and Dawnya Calbreath, at the Burger King

restaurant where they worked in Spokane, Washington. At first, Pirtle denied any involvement in the crime, and he even went so far as to implicate a fictitious person named "Joe" as the culprit by mailing out taunting and threatening letters from jail supposedly authored by "Joe". At his 1993 trial, however, Pirtle acknowledged that he alone murdered Tod and Dawnya and robbed the Burger King. He testified in his own defense and described the murders in graphic and chilling detail.

The Washington Supreme Court's opinion in Pirtle's direct appeal summarized the details of Pirtle's crime, the evidence presented to the jury, and the conviction and death sentence. *State v. Pirtle*, 127 Wash.2d 628, 635-41, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996) The court also summarized the defense case, including Pirtle's testimony and the testimony of his expert witnesses:

> "Defense counsel told the jury in opening that his client had committed the killings but disputed they were premeditated. The defense focused primarily on the Defendant's mental capacity at the time of the slayings. Various friends and family members testified about Pirtle's alcohol and drug use during the week before the crime.
>
> "Blake Pirtle took the stand on his own behalf to try to establish a diminished capacity defense. He testified to a long history of drug use, but said he had not used hard drugs in several months until being fired. Then, on both Thursday and Saturday before the killings, he injected cocaine and 'crystal meth'.

After injecting methamphetamine late Saturday night, he became paranoid and started hallucinating. He contended the effect of the drugs was diminishing on Sunday morning and that he wanted more, so he decided to rob the Burger King.

"Pirtle testified he took a knife from his kitchen and left. He said he waited next to the restaurant until LeDoux left. He then went to the back door, buzzed and was allowed entry by Tod, stating he was Wesley LeDoux. He told Dawnya he was robbing the restaurant and cut the telephone cord. He then had her open the safe and confirmed that it was open. He had Dawnya tie up Tod before he did the same to her. Pirtle put the two employees in the freezer and rolled the portable freezer in front of it. He admitted he then took Dawnya's keys and emptied the tills and the safe, putting the money into bank deposit bags.

"Pirtle testified he was ready to leave when the drive-through lane signal went off. He told the customer the restaurant would not be open for twenty minutes. As he was walking back he saw the bread knife and picked it up. He then took Dawnya, who had freed her hands, out of the cooler and tried to 'intimidate' her. According to Pirtle's testimony, a struggle ensued, resulting in the knife wounds to her hands. He said when he saw the blood he 'snapped' and grabbed a paint can. He struck her twice to knock her

down, and then twice more with a different can. He then cut her throat with the knife.

"Pirtle testified he then talked Tod into leaving the cooler and walking to the office. Pirtle told him he intended only to knock him out, convinced him to remove his glasses and lie face down. Pirtle hit Tod twice with the fire extinguisher, and then used the knife to cut his throat. At that point he said he heard sounds coming from Dawnya and returned to her to cut her throat further.

"Pirtle testified he removed his clothing, put it in a bag, and put on some old clothes from the restaurant. He set the bags down outside and went and got his car. He then drove the short distance back to Burger King, loaded the bags in the car, and went home.

"The defense also offered extensive expert testimony in an effort to establish Pirtle's diminished capacity to premeditate. Dr. Dennis Pollack, a clinical psychologist, testified the Defendant was drug and alcohol dependent and had a personality disorder with antisocial and borderline features. Because of these mental disorders, Dr. Pollack did not believe the Defendant had the ability to premeditate.

"Dr. Karen Sheppard, another clinical psychologist, testified Pirtle's frontal lobes had been impaired by drug use, making it difficult for him to evaluate a situation, organize, and come to a decision.

> "Clinical psychologist Dr. Phillip Murphy testified Pirtle had likely suffered a temporal lobe seizure during the killings. He believed the Defendant could not therefore premeditate the killings.
>
> "Dr. Jonathan Lipman, a neuropharmacologist, testified concerning the effects of drugs on the brain. He explained the temporal lobe may develop heightened sensitivity to drugs with repetitive use. This reverse tolerance can result in a sudden 'kindling' or seizure. When the temporal lobe goes into seizure, the result is extreme or explosive rage. This explosive dyscontrol is frequently characterized by repetitive stabbing motions. According to Lipman, Pirtle had an abnormally large temporal lobe with scarring in an area responsible for explosive rages.

State v. Pirtle, 127 Wash.2d at 638-40.

Defense counsel presented the expert testimony of clinical psychologists and a neuropharmacologist in an effort to establish that Pirtle, due to his heavy chronic drug abuse and his acute drug use before the murders, was incapable of premeditation at the time of the murders. The defense experts based their opinions on two factors: (1) Pirtle's chronic drug abuse damaged his brain and made him prone to seizures, and (2) his acute drug use hours before the murders induced a temporal lobe seizure, or "explosive dyscontrol", at the time of the murders. The defense requested and received a jury instruction on the defense of voluntary intoxication, which stated:

> "No act committed by a person while in a state of voluntary intoxication by alcohol or drugs is less criminal by reason of that condition. However, evidence of intoxication by alcohol or drugs may be considered in determining whether the defendant acted with intent or premeditated intent to kill.
>
> *"The term intoxication refers to an impaired mental and bodily condition which may be produced either by alcohol, which is a drug, or by any other drug."*

Instruction No. 13 (emphasis added).

In their closing arguments, both the prosecutor and defense counsel focused on what the parties viewed as the single disputed issue of fact: whether Pirtle was able to premeditate the murders. Defense counsel argued at length that although Pirtle engaged in several apparently volitional acts, the murders were actually the product of a drug-induced seizure:

> "Robbery does not require premeditated intent. Second Degree Murder does not require premeditated intent. Robbery is not proof of premeditated intent to kill. Sudden rage is consistent with a drug-induced seizure, a psychotic episode, the lack of organization, the disarray, the mess. All are suggestive of a drug-induced seizure, psychotic episode. They are not suggestive of premeditated intent. What did he do? He grabbed anything available to him as a weapon. Is that evidence of premeditation?

. . .

"Premeditated intent to kill is the issue, ladies and gentlemen of the jury. Motive does not equal premeditated intent to kill. Rage does not equal premeditated intent to kill. Answering the drive-through buzzer is not premeditated intent to kill. Planning a robbery is not premeditated intent to kill. Intending a robbery, doing a robbery, is not premeditated intent to kill. Intent to kill is not premeditated intent to kill. Intent to hit someone over the head, intent to cut their throat, doing the act is not proof of premeditated intent to kill.

. . .

"You cannot compare Mr. Pirtle to anyone else. You can compare Mr. Pirtle only to his history, the acts, and the testimony. Mr. Pirtle is not a person unaffected by drugs. He is not you or I. He is not simply a person on drugs. He is not simply a person on drugs with a mental disorder. He is and was at the time a person on drugs with a mental disorder, with a characterological disorder, personality disorder. He was dysfunctional. He could act. His acts could be volitional, but he could not premeditate."

Defense counsel concluded by requesting that the jury convict Pirtle of the lesser offense of second degree (non-premeditated) murder.

The jury convicted Pirtle of two counts of aggravated murder in the first degree. The same

jury later found during the penalty phase of trial that there were not sufficient mitigating circumstances to merit leniency, and Pirtle was sentenced to death.

2. Procedural History in State Court

Pirtle appealed his conviction and death sentence to the Washington Supreme Court. The Washington Supreme Court unanimously affirmed the conviction and sentence of death, and this Court denied certiorari. *State v. Pirtle, supra.* In 1997 Pirtle, represented by new counsel, filed a personal restraint petition with the Washington Supreme Court.[1] This petition raised, *inter alia,* several claims that trial counsel provided ineffective assistance. One of those claims alleged that trial counsel performed deficiently by failing to request a diminished capacity jury instruction and by successfully proposing an instruction on the defense of voluntary intoxication. On October 1, 1998, the Washington Supreme Court unanimously denied Pirtle's personal restraint petition. *In re Pirtle,* 136 Wash.2d 467, 965 P.2d 593 (1998). The Supreme Court held that Pirtle's ineffectiveness claim regarding the jury instructions was procedurally barred but rejected the remaining ineffectiveness claims on the merits. 136 Wash.2d at 487-94.

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[1] A personal restraint petition is a post-conviction collateral review proceeding initiated in Washington's appellate courts. *See* Washington Rules of Appellate Procedure (RAP) 16.3-16.15; RAP 16.24-16.27.

3. Federal Habeas Corpus

In 1999 Pirtle filed a petition for writ of habeas corpus with the federal district court below. This petition repeated the claims that had been presented to the Washington Supreme Court, including the allegation that defense counsel were ineffective for failing to propose a diminished capacity instruction in lieu of a voluntary intoxication instruction. The district court issued a series of three decisions resolving the merits of Pirtle's claims. The third and final decision conditionally granted the writ as to the death sentence but upheld the underlying aggravated murder conviction. *Pirtle v. Lambert*, 150 F. Supp. 2d 1078 (E.D. Wash. 2001); App. 49a. The district court concluded that the admission of a statement Pirtle made at the time of his arrest was constitutionally erroneous and that counsel provided ineffective assistance at trial and on appeal by not taking appropriate action with respect to that statement. *Id.* at 1098; App. 113a-115a.

Both parties appealed. A divided panel of the Ninth Circuit reversed the district court and remanded with instructions to grant the writ with respect to the guilt phase of Pirtle's trial. *Pirtle v. Morgan*, 313 F.3d 1160 (9th Cir. 2002); App. 1a. The majority held that defense counsel were ineffective for submitting the defense case to the jury on a voluntary intoxication theory and for failing to request a diminished capacity instruction.[2]

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[2] The pattern jury instruction in Washington courts for the defense of diminished capacity provides:

> "Without the diminished capacity jury instruction, defense counsel could not tie the evidence to the law, rendering null defense counsel's efforts to succeed in the central issue -- whether Pirtle could premeditate the murders. Put another way, the intoxication instruction misled the jurors to believe that if Pirtle was not intoxicated at the time of the murders, then they could not find that he suffered from a diminished capacity."

Id. at 1171; App. 22a. The majority acknowledged that there was substantial evidence that Pirtle premeditated the murders, but the court ruled that it could not consider the evidence in its review because that would "invad[e] the province of the jury." *Id.* at 1174; App. 28a. "In sum, we lack confidence about the outcome of Pirtle's trial because of the possibility that the jury rejected Pirtle's diminished capacity defense only because it found that he was not intoxicated at the time of the murders." *Id.*; App. 29a.

Judge Tallman dissented and would have rejected Pirtle's ineffectiveness claim. *Id.* at 1175; App. 30a. Judge Tallman reviewed the testimony presented to Pirtle's jury and rejected the majority's conclusion that the voluntary intoxication instruction somehow led the jury astray.

> Evidence of a mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form [the requisite mental state, which in Pirtle's case would be "the premeditated intent to kill"].

11 Washington Practice: Washington Pattern Jury Instructions -- Criminal (WPIC) 18.20.

> "The defendant's experts relied heavily on the fact that, while Pirtle's chronic drug use rendered Pirtle mentally ill and prone to seizures, it was his acute drug use just hours before the murders that induced the seizure or explosive dyscontrol. In other words, drug and alcohol abuse was the catalyst that triggered the mental or bodily impairment created by years of chronic substance abuse by Pirtle, making premeditation impossible.
>
> . . .
>
> "The only reasonable conclusion when the record is viewed as a whole is that Pirtle was 'impaired' and thus 'intoxicated' at the time of the murders. Under *State v. Hansen*, 46 Wash. App. 292, 730 P.2d 706 (1986), *amended by* 737 P.2d 670 (Wash. Ct. App. 1987), the determination to seek a voluntary intoxication instruction to match the defense expert testimony *mandates* a holding that counsel's performance was not deficient."

Id. at 1176, 1178; App. 32a -33a, 38a-39a (emphasis in original).

The Ninth Circuit denied Petitioner's petition for review *en banc* on January 24, 2003. App. 47a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit decision manages to depart from two lines of this Court's jurisprudence: The *Strickland v. Washington* standard for reviewing ineffective assistance claims and the *Boyde v. California* standard for reviewing challenges to jury instructions. In this case the *Pirtle* majority

identified as a shortcoming in defense counsel's representation the request for a voluntary intoxication instruction rather than a diminished capacity instruction. But the defense theory of the case was that the murders were the result of drug-induced rage or "explosive dyscontrol," and that Pirtle's extensive use of drugs, particularly in the hours before the murders, caused a brain seizure at a critical moment in time. The defense experts' testimony did not establish a mental disorder independent of Pirtle's drug use; in fact, they testified that Pirtle's acute drug use in the hours before the crime induced the seizure that allegedly made premeditation possible. Under any standard, the voluntary intoxication instruction was neither erroneous nor prejudicial.

1. The Ninth Circuit's Readiness to Second-Guess Defense Counsel's Strategy Violates *Strickland*.

"The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986). A convicted defendant's claim of ineffective assistance of counsel is subject to a two-part analysis:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the

> defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable."

Strickland v. Washington, 466 U.S. 678, 687 (1984).

The court's review under *Strickland* is extremely limited and requires the defendant to prove counsel's "gross incompetence." *Kimmelman*, 477 U.S. at 382. The reviewing court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. In order to demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Unless the defendant's showing satisfies both the performance and prejudice prongs of this standard, the reviewing court has no basis for finding a Sixth Amendment violation. *Id.* at 687.

Washington law recognizes voluntary intoxication as a specific form of the general defense of diminished capacity. *State v. Eakins*, 127 Wash.2d 490, 498, 902 P.2d 1236 (1995); *State v. Brett*, 126 Wash.2d 136, 199, 892 P.2d 29 (1995); *State v. Sam*, 42 Wash. App. 586, 588, 711 P.2d 1114 (1986). *See also* S. Fine & D. Ende, 13B Washington Practice: Criminal Law § 3205 (1998) ("[The defense of diminished capacity] is closely analogous to that of intoxication. Indeed, the defense of intoxication is sometimes referred to as a form of diminished capacity."). The standard jury instruction on intoxication, such as the one given to Pirtle's jury, is essentially a recitation of the state statute on the

subject (Wash. Rev. Code § 9A.16.090) and provides that the defendant's use of alcohol or drugs may be considered by the jury in determining whether the defendant had the requisite mental state for the charged crime.

The facts Pirtle's defense counsel were required to work with centered primarily on a client awash in substance abuse who, according to the defense experts, suffered a drug-induced seizure episode at the time of the murders. Sensibly, defense counsel sought and received an instruction on voluntary intoxication to negate the element of premeditation. The Ninth Circuit majority, however, using 20/20 hindsight concluded that the more general diminished capacity instruction would have been a better choice. But both instructions say essentially the same thing, the only difference being the triggering mechanism for their application. For a general diminished capacity instruction, there must be a mental disorder of some sort that is the cause of the defendant's asserted inability to form the requisite mental state; for an intoxication instruction, it is specifically the defendant's use of alcohol or drugs.

The intoxication instruction was clearly the more suitable fit for Pirtle's defense. As Judge Tallman observed in his dissent:

> "Pirtle's claim of diminished capacity was based on his voluntary use of illicit drugs hours before the murders *in combination with* the long-term effects of chronic drug abuse on his brain. Washington's voluntary intoxication instruction provided an adequate vehicle for

> the jury to evaluate the evidence introduced by the defense. Both counsel argued extensively that the only issue for the jury to decide was Pirtle's ability to form premeditated intent to kill. Under Washington law, the instruction Pirtle's counsel requested provided sufficient guidance to the jury in its deliberations."

App. 30a-31a; *Pirtle v. Morgan*, 313 F.3d at 1175 (Tallman, J., dissenting) (emphasis in original). Contrary to the *Pirtle* majority's view, nothing in the intoxication instruction misled or prevented the jury from considering Pirtle's use of drugs on his ability to premeditate the murders. Instruction No. 13 defined intoxication as "*an impaired mental and bodily condition* which may be produced either by alcohol, which is a drug, or by any other drug." As Judge Tallman correctly observed, a person may be "coming down" from drugs (as Pirtle suggested) yet still be "impaired" by the effects of those drugs and therefore be "intoxicated" as that word is used in Instruction No. 13. Reading that instruction as a whole, Pirtle's jury clearly understood that a person is in "a state of voluntary intoxication" if he is in an "impaired mental or bodily condition" as a result of drugs or alcohol. A frontal lobe seizure caused by drug usage would, in the understanding of a reasonable jury, constitute such an "impairment", especially if that jury (like Pirtle's) had been schooled on the subject by defense expert witnesses.

Under Washington law, the trial court would not have been obligated to give a diminished capacity instruction to Pirtle's jury simply because defense

counsel could have requested one. In *State v. Hansen*, 46 Wash. App. 292, 730 P.2d 706, 737 P.2d 670 (1986), the case cited in Judge Tallman's dissent, the defendant presented substantial evidence, including expert testimony that he suffered from a mental condition as a result of chronic drug use and also that he was under the influence of drugs at the time of his crime. *Hansen*, 46 Wash. App. at 294-95. The trial court gave a jury instruction on voluntary intoxication but refused to give the defendant's proposed instruction on diminished capacity. *Id.* at 296. The Washington Court of Appeals rejected the defendant's challenge to the trial court's denial of a diminished capacity instruction:

> "Without question, substantial evidence was presented in the case at bar to support Hansen's theory that his drug intoxication produced a mental disorder -- schizophrenia -- that bore upon his ability to form the requisite intent to commit the crimes charged. However, . . . the trial court admitted psychiatric evidence on that issue. [H]ere the jury was instructed that it could consider how Hansen's drug intoxication affected his ability to form the requisite specific intent.
>
> "Hence, we find that the instructions given by the trial court were sufficient to permit Hansen to argue, based on the evidence, his theory of the case. The court did not err, therefore, by refusing to give the additional instructions on diminished capacity that Hansen proposed."

Hansen, 46 Wash. App. at 299-300 (footnote and citations omitted).[3]

Thus, Washington law on the subject strongly pointed to intoxication as the appropriate defense in Pirtle's case. Counsel cannot be faulted for failing to request an instruction, such as one concerning diminished capacity, where the trial court is unlikely to grant the request. The Ninth Circuit erred by presuming that both instructions were equally available to counsel under the facts of Pirtle's case.[4] The intoxication instruction strongly supported the defense theory of the case, and it was stronger than a diminished capacity defense would have been. There was voluminous, undisputed evidence that Pirtle had engaged in extensive drug use prior to the killings and disputed evidence of a mental disorder that was discovered only after the crimes. A more general diminished capacity defense would have been highly suspicious to any jury because of the coincidental nature of the condition -- Pirtle's alleged mental disorder fortuitously flaring up at a critical point in the robbery and, soon thereafter, disappearing and allowing Pirtle to again take rational steps to hide his crimes and to escape. Apart from Pirtle's drug use, the alleged mental disorder that would have

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[3] Moreover, in view of the substantial overlap between the two defenses, a trial court is not obligated to give separate instructions on diminished capacity and voluntary intoxication. *State v. Furman*, 122 Wash.2d 440, 454, 858 P.2d 1092 (1993).

[4] It is axiomatic that, had Pirtle received a diminished capacity instruction, he would now be faulting counsel for the failure to request a voluntary intoxication instruction and would point to the extensive evidence of his drug use shortly before the crime and the effect it had on his ability to premeditate.

supported a diminished capacity defense did not exist. The intoxication defense, therefore, was the more appropriate fit in Pirtle's case.

2. The Ninth Circuit's Review of One Jury Instruction in Artificial Isolation Violates *Boyde v. California*.

Even assuming *arguendo* that counsel *should* have requested a diminished capacity instruction (and further assuming *arguendo* that the trial court *would* have given the instruction), there is no reasonable probability that the error affected the outcome in Pirtle's case. The Ninth Circuit's conclusion that the omission of this one instruction undercut the entire defense and misled the jury ignores the State's evidence, Pirtle's damaging testimony, the other jury instructions, the testimony of the defense experts (who stated that Pirtle was unable to premeditate), the arguments of the parties -- in short, everything else that happened at trial.

If Pirtle had raised this claim as a due process challenge to the instructions given at trial, the reviewing court would be required to review the instructions deferentially and in light of the entire trial -- *not* in artificial isolation, as the Ninth Circuit has done in Pirtle's case. *See, e.g., Boyde v. California*, 494 U.S. 370, 378 (1990); *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973). The proper standard for reviewing such a claim is "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the constitution." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (quoting *Boyde*, 494 U.S. at 380).

Under that standard Pirtle would be required to show that "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Cupp*, 414 U.S. at 147. And Pirtle's burden of challenging the *failure* to give a particular instruction (such as a diminished capacity instruction) would be even weightier, because an omitted or incomplete instruction is far less likely to be prejudicial than an erroneous instruction. *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977). The reason why reviewing courts are not permitted to parse jury instructions in artificial isolation is because

> "[A] judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge. Thus not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction."

Cupp, 414 U.S. at 147.

There is no principled reason for applying a different, less deferential standard in the context of an ineffectiveness claim that is premised upon allegedly faulty instructions. The Ninth Circuit significantly eased Pirtle's burden under *Strickland* by focusing exclusively on a hypothetical, omitted instruction (concerning diminished capacity) and ignoring the fact that the expert witnesses Pirtle summoned all told the jury that Pirtle could not

premeditate, yet the jury found that he could. The jury was *not* told that it should disregard the defense experts and defense counsel's theory of the case. The jury knew from the evidence and from the arguments of the prosecution and the defense that the question of Pirtle's ability to premeditate at the time of the crimes was the central issue in the case. That the jury chose to convict Pirtle of premeditated murder is a result of the quality of the evidence, not a defective (or omitted) jury instruction.

It defies common sense (and violates *Strickland* and *Boyde* as well) to reduce Pirtle's heavily contested trial to a question of whether counsel should have requested a more general diminished capacity instruction rather than the specific instruction on voluntary intoxication (a species of diminished capacity). Both instructions lead to the same jury question: Did the defendant have the mental capacity to premeditate the murders? It was the evidence in Pirtle's case, not the choice of instructions, that caused the jury to reject Pirtle's theory that he was unable to premeditate.

The Ninth Circuit's professed lack of confidence in the outcome of Pirtle's trial was due to "the *possibility* that the jury rejected Pirtle's diminished capacity defense only because it found that he was not intoxicated at the time of the murders." *Pirtle*, 313 F.3d at 1174; App. 29a. The Ninth Circuit's apparent readiness to second-guess the wisdom of defense counsel's proposed instructions violates *Strickland*. The court only compounded its error by equating the "possibility" that the jury rejected Pirtle's defense with the

reasonable likelihood that the jury did so. The Ninth Circuit's decision, if allowed to stand, will merely encourage other defendants to parse and second-guess the jury instructions their counsel requested (or failed to request) at the time of trial. In Pirtle's case the Ninth Circuit used that flawed method of analysis to force the retrial of a double murder whose jury unanimously rejected the claim that he was unable to premeditate. This Court should grant review.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully Submitted.

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April 2003

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BLAKE PIRTLE, *Petitioner-Appellant,* v. RICHARD MORGAN,* Superintendent of Washington State Penitentiary, *Respondent-Appellee.*	No. 01-99012 D.C. No. CV-98-05028-JLQ

BLAKE PIRTLE, *Petitioner-Appellee,* v. RICHARD MORGAN, Superintendent of Washington State Penitentiary, *Respondent-Appellant.*	No. 01-99013 D.C. No. CV-98-05028-JLQ OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Justin L. Quackenbush, Senior Judge, Presiding

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* Richard Morgan, Superintendent, is substituted for his predecessor, John Lambert. *See* Fed. R. App. P. 43 (c)(2).

Argued and Submitted
August 8, 2002—Pasadena, California

Filed December 19, 2002

Before: Thomas G. Nelson, Richard A. Paez and Richard C. Tallman, Circuit Judges.

Opinion by Judge Paez;
Partial Concurrence and Partial Dissent
by Judge Tallman

COUNSEL

Todd Maybrown, Allen, Hansen & Maybrown, Seattle, Washington; James Lobsenz, Carney, Badley, Smith, & Spellman, Seattle, Washington, for the petitioner.

Paul D. Weisser, Donna H. Mullen, Assistant Attorneys General, Criminal Justice Division, Olympia, Washington, for the respondent.

OPINION

PAEZ, Circuit Judge:

Petitioner Blake Pirtle appeals the district court's denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 with respect to the guilt phase of his trial, during which he was convicted of two counts of aggravated first degree murder. The State appeals the district court's order conditionally granting a writ of habeas corpus as to Pirtle's death sentence.

Pirtle raises numerous arguments on appeal. We focus on only one: his claim that he was denied his Sixth Amendment right to effective assistance of counsel when his attorney failed to request a diminished capacity jury instruction. At trial, Pirtle testified that he committed the murders; the only issue in dispute was whether he acted with premeditation. Defense counsel presented substantial evidence through expert testimony to show that Pirtle lacked the capacity to premeditate because, at the time of the murders, he suffered from a right temporal lobe seizure, or "explosive dyscontrol," from chronic drug use. Nonetheless, counsel did not request a diminished capacity instruction, which would have allowed the jury to consider whether Pirtle's mental condition affected his ability to premeditate. Instead, despite the evidence that the drugs that Pirtle had used were wearing off approximately three hours before the murders, defense counsel requested an intoxication instruction. This instruction constricted the jury's consideration of the evidence relating to premeditation to the narrow issue of whether Pirtle was in a state of voluntary intoxication when he committed the murders.

We hold that, in light of the evidence presented in the guilt phase of the trial, defense counsel's failure to request a diminished capacity instruction was constitutionally deficient and that it undermines our confidence in the jury's verdict. Accordingly, we reverse the district court's denial of the writ of habeas corpus with respect to the guilt phase and remand with directions to the district court to grant a conditional writ of habeas corpus.

I. Factual Background[1]

In the opening statement at Pirtle's trial, defense counsel told the jury that Pirtle killed Ted Folsom and Dawnya Calbreath, two employees of the Argonne Road Burger King in Spokane, Washington, but argued that he did not premeditate the murders. As the Washington Supreme Court acknowledged, "[t]he defense focused primarily on [Pirtle's] mental capacity at the time of the slayings." *State v. Pirtle*, 904 P.2d 245, 252 (Wash. 1996) ("*Pirtle I*").

Both Pirtle and expert witnesses testified in support of a diminished capacity defense. Pirtle testified that he had a long history of drug use. On the Thursday and Saturday before the murders, Pirtle injected cocaine and "crystal meth." After injecting methamphetamine on Saturday night, Pirtle told the jury, he became paranoid and began hallucinating. Thereafter, at some point between 1:00 a.m. and 2:30 a.m., he used cocaine and marijuana. Pirtle explained that the effects of the drugs were wearing off — specifically, he was "startin' to come down really hard" — at approximately 4:30 a.m. or 4:45 a.m. and that he wanted more drugs. To that end, he decided to rob the Burger King. Pirtle's sister, Davida, also testified that Pirtle appeared to be "coming down" from the drugs around 5:00 a.m.

Pirtle testified that he went to the Burger King to "get some more money to get drugged out again," but did not go with the intent to kill. He

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[1] The facts are drawn from the Washington Supreme Court's opinion in Pirtle's direct appeal, see *State v. Pirtle*, 904 P.2d 245, 251-254 (Wash. 1996), and supplemented by the record before the district court.

brought a knife from his kitchen. After he arrived at the Burger King a little after 7:00 a.m. and gave his name as employee Wesley LeDoux, Folsom let him in the back door of the restaurant. Pirtle told Calbreath that he was robbing the store, and cut the telephone wire. Pirtle then put Folsom and Calbreath in the freezer with their hands bound behind their backs.

Pirtle testified that he took money from the tills and the safe and planned to leave. He then told a drive-through customer that the restaurant would not be open for twenty minutes. Pirtle told the jury that he took Calbreath out of the freezer to "intimidate" her with a bread knife that he picked up in the restaurant to ensure that she would not tell anyone that he had robbed the Burger King and to give him time to "get out of the state or whatever." He testified that Calbreath grabbed the knife and that there was a struggle, which led to her hand wounds. At the sight of blood on the knife, Pirtle explained, he "snapped." He then killed both Calbreath and Folsom.

The evidence showed that Pirtle crushed Folsom's skull, cut his neck after he was unconscious, with nine wounds to the front of the neck and eight to the back, and used a hacksaw, which was left in Folsom's back. Pirtle hit Calbreath's head, probably with a paint can. He cut her neck with a knife at least sixteen times, and she had knife wounds on her hands. The examining doctor speculated that Calbreath first suffered the wounds to her hands, probably trying to defend herself, and then Pirtle knocked her unconscious with the paint can and inflicted the neck wounds.

In addition to Pirtle's testimony that he "snapped" before committing the murders, defense counsel "offered extensive expert testimony in an effort to establish Pirtle's diminished capacity to premeditate." *Id.* at 253. Three clinical psychologists and one neuropharmacologist testified on Pirtle's behalf. Dr. Phillip Murphy opined that Pirtle suffered a temporal lobe seizure at the time of the murders. This seizure, according to Dr. Murphy, caused Pirtle to experience a level of amnesia. For example, the fact that Pirtle could not remember using a hacksaw is consistent with a level of amnesia that may result from a temporal lobe seizure. Dr. Murphy testified that, as a result of the seizure, Pirtle could not premeditate at the time of the murders.

Like Dr. Murphy, Dr. Jonathan Lipman, the neuropharmacologist, opined that Pirtle probably suffered a temporal lobe seizure at the time of the murders. Dr. Lipman explained that the right temporal lobe of the brain can develop heightened sensitivity from chronic drug use — known as "kindling" — which leads to effects that resemble schizophrenia, including hallucination, delusions, and paranoia. Once the brain is kindled, the kindling can last for several years. Kindling is associated with chronic, not acute, drug use. Dr. Lipman opined that Pirtle's brain was "kindled" from chronic drug use at the time of the murders, which was supported by the fact that Pirtle experienced auditory and visual hallucinations prior to leaving his home for the Burger King.

Dr. Lipman explained that kindling may cause seizures, or "explosive dyscontrol." He testified: "Kindling is what happened before the explosive

dyscontrol. Once the dyscontrol has occurred, kindling is kind of irrelevant[;] you've fallen off the cliff." This state of explosive dyscontrol frequently involves "repetitive stabbing or repetitive movements due to . . . dopamine stimulation of the brain." Dr. Lipman testified that the victims' neck wounds were consistent with explosive dyscontrol in a kindled person. He opined that Pirtle suffered from explosive dyscontrol at the time of the murders, which "le[ft] him without the ability to rationally think, merely to explode." Dr. Lipman testified that, in his opinion, Pirtle was incapable of premeditating the murders. Dr. Lipman emphasized that this condition was due to chronic drug use and not to acute use or intoxication.

Dr. Dennis Pollack also testified that Pirtle did not have the ability to premeditate the murders because of his drug and alcohol dependency and his drug use prior to the incident. Dr. Pollack diagnosed Pirtle with a personality disorder with antisocial and borderline features. Dr. Karen Sheppard testified, similar to Dr. Murphy and Dr. Lipman, that Pirtle's frontal lobes had been impaired from drug use at the time of the murders, which impaired his ability to evaluate a situation, to be organized, and to make decisions.

The State presented testimony on rebuttal that ultimately led the district court to grant a conditional writ as to Pirtle's death sentence. Over defense counsel's objection, the State called Deputy Calvin Walker in order to show how Pirtle appeared at the time of arrest "in reference to the large amount of testimony that [was] presented concerning [Pirtle's] mental state[.]" Deputy Walker testified that, while Pirtle was on the ground with guns

pointed at his head, he asked if Pirtle knew that he was under arrest. Then, without informing Pirtle of his *Miranda* rights, Walker asked Pirtle if he knew *why* he was under arrest. Pirtle responded, "Of course I do[;] you might as well shoot me now." Defense counsel did not object to this statement. On the basis of Deputy Walker's testimony, the State argued that Pirtle could not have suffered from a seizure at the time of the murders because he did not suffer from a seizure when he was under the stress of an arrest at gunpoint.

Defense counsel requested an intoxication instruction, which relates to defendants who commit crimes in a state of intoxication. The instruction provided:

> No act committed by a person *while in a state of voluntary intoxication* by alcohol or drugs is less criminal by reason of that condition. However, evidence of intoxication by alcohol or drugs may be considered in determining whether the defendant acted with intent or premeditated intent to kill.
>
> The term intoxication refers to an impaired mental and bodily condition which may be produced either by alcohol, which is a drug, or by any other drug.

(Emphasis added). Defense counsel did not request a diminished capacity jury instruction, although one was included in the same book of pattern instructions as was the voluntary intoxication instruction.

The jury found Pirtle guilty of first-degree premeditated murder for Calbreath's death, with two aggravating factors — (1) the murders were committed in the course of a first-degree or second-degree robbery, and (2) the murders were part of a common scheme or plan. The jury reached the same conclusion with respect to Folsom's death, finding an additional aggravating circumstance of committing the murder to conceal the perpetrator's identity. During the special death penalty proceeding, the jury returned a verdict of yes to the special sentencing issue of whether to impose the death penalty. The court then sentenced Pirtle to death.

II. Procedural History

On direct appeal, the Washington Supreme Court affirmed Pirtle's conviction and death sentence. *Pirtle I*, 904 P.2d 245, *cert. denied*, 518 U.S. 1026, 116 S. Ct. 2568, 135 L. Ed. 2d 1084 (1996). Pirtle then filed a personal restraint petition in the Washington Supreme Court, which was denied. *In re Pirtle*, 965 P.2d 593 (Wash. 1998) ("*Pirtle II*"). In the petition, Pirtle raised an ineffective assistance of counsel claim for, among other things, failing to request the diminished capacity jury instruction. Although he did not raise this issue on direct appeal, the Washington Supreme Court refused to reach it under its relitigation rule, *id.* at 607-08 & n.9, which prohibits relitigation of issues raised on direct appeal.

Thereafter, Pirtle filed a petition for a writ of habeas corpus in federal district court. The district court dismissed Pirtle's diminished capacity instruction claim, concluding that federal habeas review was barred because the Washington Supreme

Court had denied it on the basis of a state procedural rule. After dismissing Pirtle's other claims, the district court allowed discovery on Pirtle's claims relating to the "shoot me now" statement to the arresting officer.

In a careful opinion, the district court concluded that the "shoot me now" statement was both elicited in violation of *Miranda* and involuntary. *Pirtle v. Lambert*, 150 F. Supp. 2d 1078 (E.D. Wash. 2001) ("*Pirtle III*"). In determining that Pirtle's "shoot me now" statement was elicited in violation of *Miranda*, the district court relied on *Pennsylvania v. Muniz*, 496 U.S. 582 (1990), and *Rhode Island v. Innis*, 446 U.S. 291 (1980), neither of which the Washington Supreme Court addressed. *Pirtle III*, 150 F. Supp. 2d at 1088-92. The district court explained that it was undisputed that Pirtle was in custody when Deputy Walker asked him if he knew why he was under arrest, and that Pirtle was being interrogated because the statement was reasonably likely to elicit an incriminating response. Because Pirtle was subject to a custodial interrogation, law enforcement had a duty to issue *Miranda* warnings prior to asking the question.

The district court also found that Pirtle's statement was involuntary because of the severe physical coercion that he experienced when he was arrested: the police officers pointed guns at his head and threatened him with death if he did not cooperate with them. *Id.* at 1094.

The district court concluded, under the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1218 (April 24, 1996) ("AEDPA"), that the Washington Supreme

Court's opinion that Pirtle's due process, Fifth Amendment, and Sixth Amendment rights were not violated was either contrary to or an unreasonable application of clearly established federal law. *Pirtle III*, 150 F. Supp. 2d at 1088.

After finding constitutional error, the district court concluded that, at the guilt phase, there was no prejudice under *Strickland* and that the error was harmless. *Id.* at 1095-97. It concluded, however, that the error was not harmless at the penalty phase because Pirtle "had acknowledged he should die for what he had done" and his statement was a "means of undercutting the jury's own sense of responsibility for imposing the death penalty, instead placing the responsibility on Pirtle's statement that he deserved to be shot for what he did." *Id.* at 1097-98. Accordingly, the district court granted a conditional writ of habeas corpus directing the State to vacate Pirtle's death sentence or to grant a new hearing on the sentencing issues without the admission of the "shoot me now" statement.[2]

Pirtle timely appealed the district court's denial of the writ with respect to his conviction. The district court issued a Certificate of Appealability on five issues.[3] The State appealed the district court's

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[2] We need not reach Pirtle's claims involving the "shoot me now" statement because we conclude that a conditional writ is proper with respect to the guilt phase in light of counsel's constitutionally deficient performance in failing to request the diminished capacity jury instruction. Nonetheless, we commend the district court's thorough and thoughtful analysis of the *Miranda* and voluntariness issues to the state courts, which points out the deficiencies in the Washington Supreme Court's ruling on Pirtle's personal restraint petition.

[3] The five issues were:

order conditionally granting the writ of habeas corpus as to Pirtle's death sentence.

III. Application of the Antiterrorism and Effective Death Penalty Act

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1. Whether the Washington Supreme Court erroneously denied Pirtle's claim that the use of Pirtle's "shoot me now" statement violated his constitutional rights as to the guilt phase of his trial;

2. Whether the Washington Supreme Court erroneously denied Pirtle's claim that Pirtle's constitutional rights were violated during the guilt and penalty phases of Pirtle's trial due to Pirtle's counsel having a conflict of interest by also representing three witnesses who testified against Pirtle at trial;

3. Whether the Washington Supreme Court erroneously denied Pirtle's claim that Pirtle's constitutional rights were violated during the guilt and penalty phases of his trial because significant impeachment evidence concerning the State's two informant witnesses [Darin] Wheeler and Shane Botner was never disclosed to the defense prior to trial;

4. Whether the Washington Supreme Court erroneously denied Pirtle's claim that Pirtle's constitutional rights were violated during the guilt and penalty phases of his trial because [Darin] Wheeler, an alleged agent of the State deliberately elicited a statement from Pirtle about the crime he was charged with outside the presence of Pirtle's counsel;

5. Whether the Washington Supreme Court erroneously denied Pirtle's claim that Pirtle's constitutional rights were violated due to ineffective assistance of counsel during the guilt and penalty phases of Pritle's trial in ways unrelated to Pirtle's "shoot me now" statement.

We review de novo the district court's ruling on Pirtle's habeas petition. *See Avila v. Galaza*, 297 F.3d 911, 914 n.1 (9th Cir. 2002). Because Pirtle filed his habeas petition after AEDPA's effective date, AEDPA applies. *See Lindh v. Murphy*, 521 U.S. 320, 326 (1997).

Under AEDPA, federal courts may grant a writ of habeas corpus only if the state court ruling "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). A state court decision is "contrary to" federal law if it fails to apply the correct controlling Supreme Court authority or comes to a different conclusion when presented with a case involving materially indistinguishable facts. *Bell v. Cone*, 122 S. Ct. 1843, 1850 (2002). A decision is an "unreasonable application" of Supreme Court law if the state court identifies the correct legal standard but applies it in an unreasonable manner to the facts before it. *Id.*

We have relaxed AEDPA's strict standard of review when the state court reaches a decision on the merits but provides no reasoning to support its conclusion. Under such circumstances, we independently review the record to determine whether the state court clearly erred in its application of Supreme Court law. *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000) ("Federal habeas review is not de novo when the state court does not supply reasoning for its decision, but an independent review of the record is required to determine whether

the state court clearly erred in its application of controlling federal law."); *see also, e.g., Greene v. Lambert*, 288 F.3d 1081, 1089 (9th Cir. 2002). That is, although we independently review the record, we still defer to the state court's ultimate decision.

Here, however, we know that the Washington Supreme Court did not reach the merits of Pirtle's claim that his counsel's performance was constitutionally defective when his counsel failed to request the diminished capacity instruction at the guilt phase of the trial. Thus, there is no state court decision on this issue to which to accord deference. Under these circumstances, concerns about comity and federalism that arise when a state court reaches the merits of a petition for post-conviction relief do not exist. *Cf. Williams v. Taylor*, 529 U.S. 420, 437 (2000) (explaining that "comity is not served by saying a prisoner 'has failed to develop the factual basis of a claim' where he was unable to develop his claim in state court despite diligent effort"). Accordingly, following our sister circuits — the Third and the Fifth — we hold that when it is clear that a state court has not reached the merits of a properly raised issue, we must review it de novo.[4] *See Appel v. Horn*, 250 F.3d 203, 210 (3d Cir. 2001) (holding that a federal habeas court must review de novo purely legal issues and mixed questions of law and

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[4] We recognize that we applied *Delgado*'s less-deferential "independent review of the record" standard to our review of the prejudice prong of a *Strickland* claim when the state court had not reached that prong but had dismissed the claim on *Strickland*'s error prong. *See Avila v. Galaza*, 297 F.3d 911, 921 (9th Cir. 2002). Although the state court did not reach the prejudice issue in that case, it did reach the merits of the claim. Here, in contrast, the state court did not reach the merits at all.

fact when, "although properly preserved by the defendant, the state court has not reached the merits of a claim thereafter presented to a federal habeas court"); *Mercadel v. Cain*, 179 F.3d 271, 274-75 (5th Cir. 1999) (per curiam) (holding that "the AEDPA deference scheme outlined in 28 U.S.C. § 2254(d)" did not apply to the federal habeas petition because the state denied the petitioner's motion for post-conviction relief on procedural grounds and not on the merits). Nonetheless, under AEDPA, factual determinations by the state court are presumed correct and can be rebutted only by clear and convincing evidence. *See Appel*, 250 F.3d at 210; 28 U.S.C. § 2254(e).

IV. Discussion

A. Procedural Bar

There is one final issue to address before reaching the merits of Pirtle's claim of ineffective assistance of counsel for failure to request the diminished capacity jury instruction. We must determine whether the district court erred by concluding that this claim was procedurally barred. As noted, the Washington Supreme Court refused to address this claim in Pirtle's personal restraint petition because he had "already challenged the jury instructions in numerous ways," and a personal restraint petition is not a "forum for relitigation of issues already considered on direct appeal[.]" *Pirtle II*, 965 P.2d at 607 (internal quotation marks and citation omitted). The Washington Supreme Court reached this conclusion despite the fact that Washington does not permit a defendant to raise issues on direct appeal that require evidence outside the record. *See State v. McFarland*, 899 P.2d 1251,

1257 (Wash. 1995). A claim for ineffective assistance of counsel generally falls within this category. As we have explained under federal law, such a claim "normally should be raised in habeas corpus proceedings, which permit counsel 'to develop a record as to what counsel did, why it was done, and what, if any, prejudice resulted.' " *United States v. Ross*, 206 F.3d 896, 900 (9th Cir. 2000) (quoting *United States v. Pope*, 841 F.2d 954, 958 (9th Cir. 1988)). Thus, "the appropriate means" of raising such an issue is through a personal restraint petition. *See McFarland*, 899 P.3d at 1257.

The district court sua sponte raised the issue of procedural default. It concluded that the Washington Supreme Court, in relying on its relitigation rule, denied this claim on the basis of an "independent and adequate state ground" — a state procedural rule — and that Pirtle failed to excuse his default. *See Coleman v. Thompson*, 501 U.S. 722, 729-30, 750 (1991).

We review de novo the district court's conclusion that this issue was procedurally defaulted. *See Morales v. Calderon*, 85 F.3d 1387, 1389 n.6 (9th Cir. 1996). Pirtle argues, and the State concedes, that he did not violate any state rule that could amount to a procedural bar. Washington's relitigation rule does not serve as a bar to habeas review. In *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), the Supreme Court addressed California's *Waltreus* rule, which, like Washington's relitigation rule, provides that an issue raised and rejected on direct appeal generally cannot be raised in a state habeas petition. *Id.* at 805. The Court explained that a state's reliance on the relitigation rule does not amount to a ruling on the merits or a denial on

procedural grounds, and therefore does not bar federal review. *Id.* at 805-06; *see also Hill v. Roe*, 298 F.3d 796, 798 (9th Cir. 2002) (addressing California's *Waltreus* rule); *Calderon v. United States Dist. Court for Eastern Dist. of California*, 96 F.3d 1126, 1131 (9th Cir. 1996) (same). Thus, we conclude that Pirtle's claim is not procedurally barred, and now turn to the merits of the claim.

B. Ineffective Assistance of Counsel

We hold that Pirtle's counsel rendered ineffective assistance in violation of Pirtle's Sixth Amendment rights by failing to request a diminished capacity jury instruction. The only issue in dispute was whether Pirtle premeditated the murders. Although the jury could have reasonably concluded that Pirtle was not intoxicated when he committed the murders because he testified that he was "coming down" from drugs approximately three hours before the murders, his counsel requested only an intoxication instruction. This instruction prevented the jury from considering Pirtle's argument that he was incapable of premeditating the murders because of a mental disorder caused by chronic drug use. We conclude that the error was prejudicial.

[1] To establish ineffective assistance of counsel, Pirtle must show that his counsel's performance "fell below an objective standard of reasonableness" and that counsel's deficient performance prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).[5] Our

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[5] For *Strickland* claims, there is no harmless error analysis under *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). *Avila*, 297 F.3d at 918 n.7 ("We need not conduct a harmless error review of *Strickland* violations under *Brecht* [ ], because

"scrutiny of counsel's performance must be highly deferential." *Id.* at 689. We shift our perspective to "the time of counsel's conduct," shedding the "distorting effects of hindsight." *Id.* at 689-90.

To put Pirtle's appeal into perspective, he "does not contend that effective counsel would have secured him an acquittal on the basic charges." *Phillips v. Woodford*, 267 F.3d 966, 976 (9th Cir. 2001). Rather, he asserts that had counsel presented the diminished capacity jury instruction at trial, "there is a reasonable probability that the jury would not have found him eligible for the death penalty[.]" *Id.*

1. Deficient Performance

[2] We conclude that Pirtle has successfully rebutted the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Strickland*, 466 U.S. at 689. A reasonably competent attorney would have requested a diminished capacity instruction in light of (1) the fact that Washington had long recognized a diminished capacity defense prior to Pirtle's trial; (2) defense counsel's theory that Pirtle's brain was kindled from chronic drug use and then he suffered from a seizure, or explosive dyscontrol, at the time of the murders that impaired his ability to premeditate; and (3) the fact that there was evidence to support a finding that Pirtle was not intoxicated at the time of the murders.

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'[t]he *Strickland* prejudice analysis is complete in itself; there is no place for an additional harmless-error review.' " (quoting *Jackson v. Calderon*, 211 F.3d 1148, 1154 n.2 (9th Cir. 2000), *cert. denied*, 531 U.S. 1072, 121 S. Ct. 764, 148 L. Ed. 2d 665 (2001))).

[3] Despite the substantial evidence that defense counsel presented that Pirtle could not premeditate at the time of the murders due to a temporal lobe seizure, or explosive dyscontrol, defense counsel did not request the diminished capacity instruction. Washington had recognized a diminished capacity defense long before Pirtle's trial in 1993. *See Washington v. Griffin*, 670 P.2d 265, 266 (Wash. 1983) (citing *State v. Ferrick*, 506 P.2d 860 (Wash. 1973)). A diminished capacity instruction is warranted when there is "substantial evidence of such a condition, [and] the evidence must logically and reasonably connect the defendant's alleged mental condition with the asserted inability to form the required specific intent to commit the crime charged." *Id.* (quoting *Ferrick*, 506 P.2d at 862) (alteration in original). A generalized instruction on criminal intent is insufficient to instruct a jury about mental disorders which could diminish a defendant's capacity to commit a crime. *Id.*

At the time of Pirtle's trial, Washington's model diminished capacity instruction provided:

> Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant has the capacity to form _____ [Fill in requisite mental state].

Washington Pattern Jury Instruction: Criminal No. 18.20 (1993).

Instead of a diminished capacity instruction, defense counsel requested a voluntary intoxication instruction, which provided:

> No act committed by a person *while in a state of voluntary intoxication* by alcohol or drugs is less criminal by reason of that condition. However, evidence of intoxication by alcohol or drugs may be considered in determining whether the defendant acted with intent or premeditated intent to kill.
>
> The term intoxication refers to an impaired mental and bodily condition which may be produced either by alcohol, which is a drug, or by any other drug.

(Emphasis added.)[6]

The State argues that the intoxication instruction was sufficient and proper because "[t]he record does not reflect that [Pirtle's] alleged mental disorder existed independent of the drug abuse." The State contends that "both instructions say essentially the same thing" and that the intoxication instruction was more appropriate because of Pirtle's drug use prior to the murders.

[4] The diminished capacity instruction, however, is materially distinct from the intoxication instruction, and was proper under the circumstances.

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[6] This instruction was derived from Washington Pattern Jury Instruction: Criminal No. 18.10 (1993), which, at the time of Pirtle's trial, provided:

> No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant [acted] [or] [failed to act] with _____ [Fill in requisite mental state].

The defense's theory was that Pirtle's chronic drug use caused a temporal lobe seizure, or explosive dyscontrol, at the time of the murders, which prevented him from being able to premeditate.

[5] Although the jury could have concluded that Pirtle was intoxicated at the time of the murders, this was not the only reasonable conclusion for the jury to draw. On the state of the record, it would have been reasonable for the jury to conclude that Pirtle was no longer in a state of intoxication when he committed the murders. Pirtle testified that the effects of the drugs that he used prior to the murders were diminishing by approximately 4:30 a.m. or 4:45 a.m. — that is, he was "com[ing] down" from the drugs — and therefore he wanted more. Pirtle's sister corroborated this. Approximately three hours later, Pirtle committed the murders.

[6] Nonetheless, the jury was instructed that it could consider the effect of drugs on Pirtle's ability to premeditate only if he was "in a state of voluntary intoxication." If the jury concluded that Pirtle was not in a state of voluntary intoxication at the time of the murders then it had no legal context in which to interpret the expert testimony about the effect of Pirtle's chronic drug use on his ability to premeditate. That is, the jury had no legal framework in which to place the psychologists' and the neuropharmacologist's testimony. *Cf. Penry v. Johnson*, 532 U.S. 782, 797 (2001) (holding that the jury should have been provided with a "vehicle . . . to give mitigating effect to the evidence of [the petitioner's] mental retardation and childhood abuse" in the sentencing phase of a death penalty case); *Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985) (explaining that the Supreme Court

"presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them"). Without the diminished capacity jury instruction, defense counsel could not tie the evidence to the law, rendering null defense counsel's efforts to succeed in the central issue — whether Pirtle could premeditate the murders. Put another way, the intoxication instruction misled the jurors to believe that if Pirtle was not intoxicated at the time of the murders, then they could not find that he suffered from a diminished capacity.

This would be a very different case if the only reasonable inference for the jury to draw from the evidence was that Pirtle was intoxicated at the time of the murders. Under such circumstances, either the diminished capacity or the intoxication instruction would have sufficed pursuant to a Washington court of appeals decision, *State v. Hansen*, 730 P.2d 706, 711 (Wash. App. 1986), *amended*, 737 P.2d 670 (Wash. App. 1987), decided prior to Pirtle's trial. In *Hansen*, the defendant "injected himself with several large doses of cocaine" at the time of his crime. *Id.* at 708. An expert witness opined that the defendant's drug use caused schizophrenia, which affected his ability to form the requisite intent. *Id.* at 711. The Washington court of appeals concluded that the intoxication instruction permitted the defendant to argue his case, and therefore the trial court did not err by refusing to give the diminished capacity instruction. *Id.; cf. U.S. v. Mason*, 902 F.2d 1434, 1438 (9th Cir. 1990) (holding that it is not reversible error for a trial court to reject a defendant's proposed jury instruction on

his theory of the case "if other instructions, in their entirety, adequately cover that defense theory").[7]

As Pirtle's trial counsel conceded in the habeas proceeding, they did not make a tactical decision to propose the intoxication instruction instead of the diminished capacity instruction. Notably, despite their acknowledgment that the "main thrust of the defense" was that Pirtle's "ability to premeditate was impaired by his physical and psychological injuries [caused by chronic drug use] and that Mr. Pirtle likely suffered a temporal lobe seizure at the time of the killings," neither attorney considered proposing a diminished capacity instruction. Trial counsel acknowledged that the intoxication instruction "did not capture the true nature of [the] defense" and that, without the diminished capacity instruction,

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[7] The State relies on *State v. Furman*, 858 P.2d 1092 (Wash. 1993), to support its argument that the trial court was not required to give the diminished capacity instruction. *Furman*, however, was decided after Pirtle's trial. Further, it is distinguishable. First, unlike here, the evidence in *Furman* showed that the defendant was both intoxicated and suffering from a severe personality disorder at the time of the murder. *Id.* at 1096. Second, the jury was given the more general diminished capacity instruction, under which the defendant could argue that "drug use and other factors" prevented him from being able to premeditate the murder. *Id.* at 1101. Although one can argue that intoxication at the time of the offense is a form of mental impairment and thus one can argue the effects of intoxication within the context of the diminished capacity instruction, as in *Furman*, the converse is not true. It is not possible to argue that a diminished mental capacity — as a result of a mental disorder independent from intoxication at the time of the offense — falls within the intoxication instruction. The intoxication instruction encompasses only those individuals in a state of intoxication at the time of the offense.

the jury was "left without any guidance as to the significance of the defense testimony."

2. Prejudice

After concluding that defense counsel's representation was deficient, we must determine whether Pirtle was prejudiced by the error. Pirtle argues that in light of the evidence presented during the guilt phase of the trial, the jury, if provided with the diminished capacity instruction, could have reasonably concluded that he did not premeditate the murders. We agree.

[7] Under *Strickland*, we must ask whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694; *accord Jennings v. Woodford*, 290 F.3d 1006, 1016 (9th Cir. 2002). "A 'reasonable probability' is less than a preponderance: '[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.' " *Strickland*, 466 U.S. at 694. In undertaking this assessment, we must assess the "totality of the evidence." *Id.* at 695.

[8] The only issue in dispute at the guilt phase of Pirtle's trial — premeditation — was critical. As noted, resolution of this issue determined whether Pirtle was eligible for the death penalty. Under Washington law, premeditation is an element of first-degree, but not second-degree, murder. *State v. Bowerman*, 802 P.2d 116, 123 (Wash. 1991). A defendant convicted of second-degree murder cannot

be sentenced to death. Wash. Rev. Code §§ 9A.32.030, 10.95.020; *State v. Fortune*, 909 P.2d 930, 933 (Wash. 1996).

Pirtle's organized, reasoned actions prior to the murders are consistent with an intent to rob, but not necessarily an intent to kill. Pirtle's actions after seeing the blood on Calbreath's hands are markedly different, lacking the logical deliberate character of his prior actions. Pirtle contends that the jury could have reasoned that he decided to rob the Burger King because he was angry that he had been fired, and that he brought a knife to intimidate the employees present at the restaurant. The jury could have decided that he did not wear a mask to facilitate entry, enabling him to ring the buzzer rather than break in. The jury could have concluded that Pirtle tied up Calbreath and Folsom because he did not intend to kill them; otherwise, presumably he would have murdered them immediately. Pirtle also provided an explanation for why he returned to the freezer. He testified that he wanted to intimidate Calbreath so that she would not inform anyone that he committed the robbery. Once a struggle ensued and Pirtle saw blood, he "snapped" or, as the experts explained, suffered from a temporal lobe seizure, or explosive dyscontrol. As a result, Pirtle may not have had the ability to premeditate at that time.

Pirtle also explains that all of the weapons that he used were from the restaurant, indicating that he did not plan the murders before going to the restaurant. According to Dr. Lipman, the victims' neck wounds were consistent with the behavior of someone whose brain was kindled and suffering from explosive dyscontrol. That Pirtle did not remember the hacksaw and other parts of his crimes is

consistent with Dr. Murphy's testimony that Pirtle suffered from a seizure, which caused a certain level of amnesia. The fact that Pirtle later attempted to cover up his crime is not inconsistent with the possibility that he suffered from a seizure or explosive dyscontrol at the time of the murders.

The Sixth Circuit's opinion in *Barker v. Yukins*, 199 F.3d 867 (6th Cir. 1999), which addressed a due process violation, is instructive here.[8] In that case, the petitioner, Stacey Barker, was convicted of murder in state court, and subsequently filed a federal habeas petition. Barker's theory at trial was that she committed the murder in self defense to prevent an imminent rape. The trial court instructed the jury that Barker was entitled to use deadly force in self defense if she honestly believed that she was in danger of death or serious bodily injury. The trial court refused to instruct the jury that, under Michigan law, Barker could use deadly force to resist a rape. The Michigan Supreme Court found that the trial court erred by refusing to give the more specific rape instruction, but that the error was harmless.

Under AEDPA's deferential standard of review, the Sixth Circuit held that the Michigan Supreme Court's finding of harmless error was an unreasonable application of federal law. The Sixth Circuit reasoned that it had "no way of knowing" whether the jurors rejected Barker's self defense claim because, even though they believed that she

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[8] We recognize that *Barker* involved a harmless error analysis under *Brecht*, which involves a lower standard than *Strickland*'s standard for prejudice. *See Kyles v. Whitley*, 514 U.S. 419, 436 (1995). Nonetheless, we find *Barker* persuasive.

was about to be raped, they did not think that she was in danger of death or serious bodily injury. *Id.* at 873-74. The court held that this uncertainty raised "grave doubt as to whether the general self defense instruction created a substantial and injurious influence on the verdict." *Id.* at 873 (citing *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995)).

As in *Barker*, here the jury could have believed Pirtle's testimony that he did not intend to commit the murders and only did so after he "snapped," which was supported by the experts' testimony. If the jury concluded that Pirtle was not intoxicated, however, then it would not have been able to consider Pirtle's diminished capacity defense. As in *Barker*, we cannot know what effect the intoxication instruction, or failure to give the diminished capacity instruction, had on the jury.

We recognize that there was evidence that Pirtle premeditated the murders. The State presented circumstantial evidence to support this conclusion.[9] It also "effectively cross-examined each expert witness providing a factual basis sufficient for the jury to find Pirtle's capacity for premeditation was not eliminated by his mental condition, by cocaine intoxication, or by 'kindling' of his brain at

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[9] The State relied primarily on the following circumstantial evidence to show premeditation: Pirtle had a motive to kill Calbreath because she had been a witness for management when he was terminated; Pirtle supposedly needed money for drugs but decided to rob the Burger King instead of taking his mother's "fairly sizable amount of money" from his house; he took a knife with him; he brought clothes with him (which Pirtle disputed); and he "had the presence of mind" to attempt to cover up his crime.

the time of the murders."[10] *Pirtle I*, 904 P.2d at 257. The Washington Supreme Court found that there was enough evidence to withstand a sufficiency of the evidence challenge on direct appeal. *Pirtle I*, 904 P.2d at 255-57. This, however, required the Washington Supreme Court to draw all reasonable inferences in favor of the State and then to decide whether the jury could have concluded that Pirtle premeditated the murders.

In contrast, under the standard that we must apply, we would be "improperly invad[ing] the province of the jury" if we determined that no reasonable juror would have believed that Pirtle intended only to rob the Burger King and then committed the murders after he suffered from a

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[10] On cross-examination, the State elicited testimony from Dr. Pollack that suggested that Pirtle intentionally tried to make himself look bad during testing, and that many tests did not allow Dr. Pollack to come to a conclusion about Pirtle's ability to premeditate. Dr. Pollack also explained that his definition of premeditation involved planning in an organized and systematic fashion, and he acknowledged that Pirtle had the capacity to decide to commit the crime, plan it, and execute the plan. Dr. Lipman conceded that someone under the influence of the drugs that Pirtle used could carry out an intent to do something and that his "energy to fulfill a motive could be enhanced." Dr. Murphy acknowledged that he based his testimony on Pirtle's account of the events, and "a person of normal or even borderline normal intelligence could recognize" that his statements in such circumstances might be incriminating.

The State also called Dr. Roy Mays, a psychologist, who testified that Pirtle tried to portray himself in a bad light when taking the Minnesota Multiphasic Personality Inventory test, and thus, the test results were invalid. Dr. Mays also testified that the neuropsychological tests did not indicate either a neurological problem or mental incapacity.

temporal lobe seizure, or explosive dyscontrol. *See Barker*, 199 F.3d at 874. This weighing of evidence and credibility determination is for the jury. *Cf. Payton v. Woodford*, 299 F.3d 815, 829 n.12 (9th Cir. 2002) ("We steer clear of determining the value of the evidence in favor of ensuring that the jury had the opportunity to decide for itself whether Payton's religious beliefs were merely 'fortuitous.' ").

[9] In sum, we lack confidence about the outcome of Pirtle's trial because of the possibility that the jury rejected Pirtle's diminished capacity defense only because it found that he was not intoxicated at the time of the murders. There is no countervailing possibility that the jury rejected the diminished capacity defense on the merits, because it was not told of the availability of the defense. If the jury had been given the diminished capacity instruction, then it reasonably could have found that Pirtle did not premeditate the murders even if it concluded that he was not intoxicated. Pirtle is entitled to have a jury make this determination. Accordingly, we conclude that there is a reasonable probability that, but for Pirtle's counsel's deficient performance, the outcome of his trial would have been different.[11]

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[11] Because we direct the district court to order a conditional writ of habeas corpus in light of Pirtle's ineffective assistance of counsel claim for failing to request the diminished capacity jury instruction, we do not reach the other issues that Pirtle raises. *See Karis v. Calderon*, 283 F.3d 1117, 1127 n.2 (9th Cir. 2002), *petition for cert. filed* (U.S. Sep. 13, 2002) (No. 02-434) ("Because we affirm the district court's decision to grant Karis' petition for ineffective assistance of counsel in the penalty phase, we do not reach Karis' claim with regard to the prosecutor's having mentioned Steuben's testimony during the

V. Conclusion

[10] Because we conclude that Pirtle's Sixth Amendment rights were violated when his counsel rendered ineffective assistance by failing to request the diminished capacity jury instruction, we reverse the district court's denial of the writ of habeas corpus with respect to the guilt phase. On remand, the district court shall enter judgment granting a conditional writ of habeas corpus directing that Pirtle be released from custody unless the State of Washington begins trial proceedings against Pirtle within 180 days or as extended by the district court as reasonably necessary.

Appeal No. 01-99012: REVERSED AND REMANDED.

Appeal No. 01-99013: DISMISSED AS MOOT.

TALLMAN, Circuit Judge, concurring and dissenting:

I respectfully disagree with the Court's conclusion that Pirtle's constitutional rights were violated because of his counsel's failure to request a diminished capacity jury instruction. Pirtle's claim of diminished capacity was based on his voluntary use of illicit drugs hours before the murders *in combination with* the long-term effects of chronic drug abuse on his brain. Washington's voluntary intoxication instruction provided an adequate vehicle for the jury to evaluate the evidence introduced by

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penalty phase."). In light of our disposition, we dismiss the State's appeal as moot.

the defense. Both counsel argued extensively that the only issue for the jury to decide was Pirtle's ability to form premeditated intent to kill. Under Washington law, the instruction Pirtle's counsel requested provided sufficient guidance to the jury in its deliberations. Pirtle's ineffective assistance of counsel claim fails under state and federal law and I would uphold his conviction and death sentence against all other claims contained in the habeas petition.

I

As a preliminary matter, I agree with the Court that there is no procedural bar to our consideration of this issue for the first time on appeal. Under *Ylst v. Nunnemaker*, 501 U.S. 797 (1991), and our own case law, a state rule barring relitigation of claims during state habeas proceedings does not bar a federal court's consideration of those claims during federal habeas review. *See Calderon v. United States Dist. Court*, 96 F.3d 1126, 1131 (9th Cir. 1996) (citing *Ylst*, 501 U.S. at 806).

II

On the merits, however, after reviewing the entire state criminal trial transcript and the evidence discovered in the federal habeas litigation, I cannot agree with the Court's conclusions regarding Pirtle's Sixth Amendment claim.

Under the first prong of the *Strickland* analysis, the Court articulates three premises for its holding that a reasonably competent attorney would have requested a diminished capacity instruction: (1) Washington recognizes a diminished capacity defense; (2) Pirtle's defense theory was that he

suffered a seizure or explosive dyscontrol at the time of the murders; and (3) Pirtle was not intoxicated at the time of the murders. The record fails to support the conclusion reached by the Court.

The totality of the record adduced at trial shows that Pirtle was intoxicated, as defined in the jury instructions,[1] at the time of the murders. The defendant's experts relied heavily on the fact that, while Pirtle's chronic drug use rendered Pirtle mentally ill and prone to seizures, it was his acute drug use just hours before the murders that induced the seizure or explosive dyscontrol. In other words, drug and alcohol abuse was the catalyst that triggered the mental or bodily impairment created by

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[1] Washington's Voluntary Intoxication Instruction (given to jury):

> No act committed by a person while in a state of voluntary intoxication by alcohol or drugs is less criminal by reason of that condition. However, evidence of intoxication by alcohol or drugs may be considered in determining whether the defendant acted with intent or premeditated intent to kill.
>
> The term intoxication refers to an impaired mental and bodily condition which may be produced either by alcohol, which is a drug, or by any other drug.

Washington's Diminished Capacity Instruction (not requested or given):

> Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant has the capacity to form ____ [Fill in the requisite mental state (which here would be "the premeditated intent to kill the two victims")].

years of chronic substance abuse by Pirtle, making premeditation impossible.

For example, defense expert Dr. Dennis Pollack, a clinical psychologist, testified on direct:

Q Do you have an opinion, Dr. Pollack, based upon reasonable, medical probability, whether or not Mr. Pirtle's mental disorder *would have been affected by a significant use of drugs or alcohol within three to four hours preceding the incident at the Burger King restaurant?*

A Well, *given the fact that he kind of just recently used drugs, it would increase the difficulties in controlling behavior with regard to the Axis II diagnosis,* the personality problems, but also the prolonged history of the drug abuse and the alcohol. *It basically takes a long time to come down from the influence of those drugs* when you have been doing to the brain what he had been doing.

Q How would Mr. Pirtle's mental disorder, particularly speaking of the Axis I diagnosis you have made, be affected by the ingestion of drugs and/or alcohol of a considerable quantity three to four hours prior to —

A I think it would be in —

Q (Continuing) — the incident

A (Continuing) — would increase the pathological behavior you find under the Axis II diagnosis, so Axis I, obviously if you ingest alcohol and you have been a sober alcoholic, you are no longer a sober alcoholic and you are going to drink a lot. . . .

Q *Assuming that Mr. Pirtle consumed drugs or alcohol, cocaine, possibly crystal meth, speed and alcohol within a three- to four-hour time frame prior to the incident*, do you have an opinion based upon a reasonable degree of medical certainty whether or not Mr. Pirtle lacked the ability to form premeditated intent to kill on May 17th, 1992?

A I have an opinion.

Q And what is that opinion?

A I don't think that at the time he was capable of premeditation, planned, organized act.

Q *And was that mental disorder affected by the consumption of those drugs and/or alcohol?*

A *Yes.*

(Emphasis added).

Similarly, another defense expert, clinical psychologist Dr. Karen Sheppard, testified on direct:

Q Doctor, you would agree basically, and isn't it your testimony, that the effect of drugs on people who abuse drugs is bad?

A Well, there are several things that you need to take into consideration. You are looking at the length for which they have been doing it and the type of chemical that they have ingested over time, *and in Mr. Pirtle's case, we are looking at intoxication, as well as long-term effects of his drug usage.*

(Emphasis added).

Dr. Phillip Murphy, another clinical psychologist hired by the defense, provided even more testimony regarding the effects of Pirtle's acute drug use on his mental condition at the time of the murders:

Q You have indicated that certain parts of the brain have a lower threshold for seizures than others.

A Uh-huh.

Q And you spoke of that when I asked you a question about drugs affecting the limbic system. Are there other factors that suggest or that appear to correlate between the proneness to a seizure or not?

A In general, when you have somebody with a seizure disorder, you want to make sure that they don't become excessively fatigued, that they don't become excessively stressed, *and that they stay off drugs and alcohol. Those are the three factors which are going to lower their seizure threshold.*

. . . .

Q If a person was on — if there was evidence that a person had used cocaine, methamphetamine, would that be the kind of drugs you refer to when you say there is a correlation?

A Yes, definitely.

. . . .

Q Now, what I want to ask you is, there is the factors and there is the sequence. What could trigger such a seizure?

A Okay, one — one, we would have to imagine that we've got some irritative focus, meaning based upon the neuropsychologicals that we are saying that he has a focal right hemisphere deficit. Now that's at a functional level. What that would translate to potentially is either a biochemical lesion, okay, which is one you

> may not be able to see, for example, like on an MRI or CAT scan, or an anatomical lesion which you could see on those. In cases similar to Mr. Pirtle's, I would predict that you probably would see some anatomic or biochemical lesion on either an MRI or a SPECT or something like that. *Given that irritative focus, then when it's assaulted, especially by stimulant drugs, it is going to increase the probability of those deficient and more epileptic-type cells kicking out at high discharge rates. Then you look at the factors of fatigue, stress, and the other effects of those drugs. . . . So those would be factors you would imagine as going to, you know, let the seizure occur, and that would be true with any type of seizure, but temporal lobe, certainly.*

(Emphasis added). Dr. Murphy offered his explanation of the relationship between Pirtle's acute drug use and the condition caused by chronic drug use at the time his crime spree was interrupted by a customer whose car triggered the drive-through signal inside the Burger King:

> Then what occurs is that the car comes through the drive-through, signals whatever that device is and it's a sound — it's a beep, okay? *Now, this man [Pirtle] at the time, because of the*

> *amount of stimulant drugs he is on, is extremely paranoid.* The beep again, temporal lobe, right temporal encoding, sets up even greater paranoia. That's when he rushes to get the female victim, okay, and then takes her out.

(Emphasis added). Dr. Murphy explained further on cross-examination, using a car as an analogy to Pirtle's brain, the effects the acute drug use had on Pirtle:

> With -- in Mr. Pirtle's case there is no evidence of him having significant enduring frontal lobe problems. Okay? Except for to the right. *However, when he is under the influence of substances that wipe out his frontal lobe function, then you are looking at something more wrong than simply one stuck valve, because basically there is no gas in the tank or no oil in the engine.*

(Emphasis added). Dr. Jonathan Lipman, a neuropharmacologist[2] called by the defense, testified similarly, indicating that chronic use causes brain sensitivity to seizures, and thus "perverts" the normal symptoms of acute use into mental illness.

This defense expert testimony refutes the Court's conclusion that Pirtle was not intoxicated. The only reasonable conclusion when the record is viewed as a whole is that Pirtle was "impaired" and thus "intoxicated" at the time of the murders. Under

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[2] According to Dr. Lipman, "[n]europharmacology is that expertise dealing with our understanding of the effects of drugs on the brain."

State v. Hansen, 730 P.2d 706 (Wash. Ct. App. 1986), *amended by* 737 P.2d 670 (Wash. Ct. App. 1987), the determination to seek a voluntary intoxication instruction to match the defense expert testimony *mandates* a holding that counsel's performance was not deficient. In *Hansen*, the defendant suffered from a mental condition caused by chronic drug use, and was under the influence of drugs at the time of the crime. 730 P.2d at 708. Rejecting a claim that the trial court erred by giving only a voluntary intoxication instruction, and not an additional diminished capacity instruction, for the jury's consideration of the defendant's asserted lack of capacity, the Washington Court of Appeals held:

> [W]e find that the instructions given by the trial court were sufficient to permit Hansen to argue, based on the evidence, his theory of the case. The court did not err, therefore, by refusing to give the additional instructions on diminished capacity that Hansen proposed.

Id. at 711.

The Court tries to distinguish the rule in *Hansen* on the ground that Pirtle was not intoxicated and concludes *Hansen* is a "very different case." But that ignores the extensive evidence the defense itself offered to explain Pirtle's behavior when he eliminated the two eye-witnesses to his robbery.

The Court notes that Pirtle said he was "coming down" from the drugs and that his sister testified similarly. Despite the testimony from *Pirtle's* experts who considered the amounts and types of drugs Pirtle ingested, and consistently concluded Pirtle's acute drug use affected him *at the*

time of the murders, the Court nonetheless finds it reasonable to conclude Pirtle was not intoxicated. The Court ignores what common sense dictates: one can be "coming down" from drugs and still be "impaired" and thus "intoxicated." To assert otherwise imposes an unrealistic result: under the Court's logic once the effects of drugs have reached their height and begun to dissipate, one is now "coming down" and thus is no longer "intoxicated." I wonder how many DUI defendants have made the same argument to other juries and—not surprisingly—to no avail.

Nevertheless, the Court errs by resting its conclusion on two portions of testimony from Pirtle and his sister, thus discounting the in-depth testimony of *Pirtle's own experts*, not to mention a common sense interpretation of Pirtle's own testimony. The only reasonable conclusion from the *entire* record is that Pirtle was intoxicated, as defined in the jury instructions, at the time of the murders, and any seizure was at least in part caused by this intoxication. Pirtle's counsel cannot be said to have acted deficiently under Washington criminal defense standards by failing to request a diminished capacity instruction since, under *Hansen* and on this evidence, the voluntary intoxication instruction provided an adequate vehicle for guiding the jury's examination of the evidence. Indeed, examining the language of the two instructions set forth in footnote 1, *supra*, it is hard to see what difference inclusion of the other instruction would have made based on this record.

But assuming for the sake of argument that counsel erred by failing to seek a diminished capacity instruction, under the second *Strickland* prong there

is no reasonable probability that this error affected the jury's verdict.

First, the jury received a total of twenty-one instructions, including an instruction that defined premeditation, another on intent, and one that allowed the jury to convict on the lesser crime of Second Degree Murder, which does not require proof of premeditation. When the instructions are viewed as a whole, it is apparent that had the jury accepted Pirtle's theory of the case, it could have found him guilty of Second Degree Murder instead of Aggravated First Degree Murder. Another instruction stating the jury could consider Pirtle's diminished capacity through some chemically induced "temporal or frontal lobe sensitivity" would have made no difference. Both sides presented this case to the jury responding to Pirtle's claimed lack of capacity to premeditate triggered by his drug use, both chronic and acute.

Second, even assuming that Washington's diminished capacity instruction somehow encompasses more on these facts than the voluntary intoxication instruction, to say that the missing instruction would have made a difference also ignores the prosecution's evidence, and Pirtle's own damaging admissions when he testified in his defense—testimony the jury obviously credited. The defense put on five experts saying Pirtle could not premeditate; the jury found that he did.

Pirtle testified to the following: on the morning of the murders he took a knife from his mother's kitchen and drove to a church next to the Burger King. He parked and staked out the restaurant for three to five minutes. He lay in wait

for a male co-worker to depart, and then, in order to gain admittance, he pushed the buzzer and falsely told victim Tod Folsom that he was the recently departed employee. After tying up both of the victims on duty inside and robbing the restaurant, he had the presence of mind to answer the drive-through signal and tell the customer that the restaurant was not yet open. He then murdered the victims one at a time using another knife he obtained at the restaurant. He took several steps to immediately cover up the crimes, including hiding his soiled clothes in a neighbor's compost pile, leaving the car at a bus station, and then writing the chilling "Joe" letters from jail which contained lurid threats[3] against the lives of other Burger King employees.

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[3] Four months after his arrest, in an apparent attempt to implicate another person named "Joe" as the person responsible for the murders, Pirtle sent letters ostensibly from "Joe" to other Burger King employees. The following is an excerpt from one of these letters read to the jury:

> My hands are the ones that took the lives of these two worthless employees there. Just so you don't think this is some kind of bullshit, here are some things you can check out that only I could know. Check and see if they ever located the male victim's wristwatch and ask if his glasses were broken or not, or how close the fucking female's head was from being completely cut off. . . . I really loved taking those two lives that day.
>
> . . . .
>
> You see, Phil, I love to take human life. It is so fucking easy to viciously kill people for me and it makes me want to come all over myself.

Pirtle's claim that he only intended to rob the Burger King for drug money was belied by his admission that on the morning of the crimes his mother had a sizable amount of money on hand at the house where he lived. He also testified that of five fast food restaurants in the area, the Argonne Road Burger King was the only one where he would be recognized, and yet he did not wear a disguise. Pirtle also had a motive: he had been fired from his Burger King job for sexual harassment, and victim Dawnya Calbreath had been one of two women present to witness his termination.

The Court's conclusion, that Pirtle's actions are consistent with only an intent to rob and not an intent to kill, is puzzling. For instance, the Court recites Pirtle's explanation for why, after the robbery was complete, Pirtle went back to the freezer holding the victims. According to Pirtle, he brought Dawnya Calbreath out of the freezer in order to "intimidate" her into not telling the police that he robbed the store. Only then, after Calbreath grabbed his knife and Pirtle saw blood on her hand, did he "snap" and kill her.

What the jury obviously concluded in rejecting this analysis is why he would try to "intimidate" *only* Calbreath? Tod Folsom could identify Pirtle, yet Pirtle did not try to "intimidate" Folsom. In fact, after Pirtle knocked Calbreath unconscious and repeatedly slashed her throat, he went back to Folsom. Did he attack Folsom in a furious rage, indiscriminately stabbing him to death? No. By his

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The jury was certainly entitled to weigh this revolting evidence in concluding that Pirtle formed the premeditated intent to kill his victims during the robbery.

own admission at trial Pirtle had the presence of mind to ask Folsom to take off his glasses, lay face down on the floor so Pirtle, as he instructed Folsom, could knock Folsom out. Once Folsom complied, Pirtle crushed his skull with a fire extinguisher, and then cut Folsom's throat. As was obvious to the jury by its verdict, these facts are entirely consistent with a premeditated intent to kill.

As if this were not enough, the jury heard Pirtle describe in his own words how, after slashing both victims, he "heard Dawnya's body making noises" and went back to cut her throat some more, nearly decapitating her. "A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (quotation marks and citation omitted). In view of these facts, I respectfully disagree with the Court's conclusion that, had there been a diminished capacity instruction given as well, there is a reasonable probability that the jury's verdict might have been different. There was no prejudice under *Strickland*.

III

The voluntary intoxication instruction was sufficient to guide the jury in evaluating the defense theory regarding lack of premeditation. Moreover, in light of the totality of the record before us, Pirtle cannot establish that his counsel's failure to request a diminished capacity instruction amounted to prejudice "so serious as to deprive [him] of a fair trial . . . ." *Strickland*, 466 U.S. at 687. Because the jury obviously considered Pirtle's theory that due to his drug use he could not premeditate, and rejected it

based on ample evidence showing premeditated intent to kill, I respectfully dissent from the Court's decision approving issuance of the writ.

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[FILED]
[January 24, 2003]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BLAKE PIRTLE, *Petitioner-Appellant,* v. RICHARD MORGAN,* Superintendent of Washington State Penitentiary, *Respondent-Appellee.*	No. 01-99012 D.C. No. CV-98-05028-JLQ ORDER

BLAKE PIRTLE, *Petitioner-Appellee,* v. RICHARD MORGAN, Superintendent of Washington State Penitentiary, *Respondent-Appellant.*	No. 01-99013 D.C. No. CV-98-05028-JLQ

Before: T.G. NELSON, PAEZ, and TALLMAN, Circuit Judges.

* Richard Morgan, Superintendent, is substituted for his predecessor, John Lambert. *See* Fed. R. App. P. 43 (c)(2).

Judge T.G. Nelson and Judge Paez have voted to deny Appellee Morgan's petition for rehearing and to deny the petition for rehearing en banc. Judge Tallman has voted to grant the petition for hearing and the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

[FILED]

[June 26, 2001]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BLAKE PIRTLE,	)	
	)	NO. CT-98-5028-JLQ
	)	
Petitioner,	)	MEMORANDUM
	)	OPINION AND
vs.	)	ORDER
	)	CONDITIONALLY
	)	GRANTING
JOHN LAMBERT,	)	PETITION FOR
	)	WRIT OF HABEAS
	)	CORPUS
Respondent.	)	CONCERNING
	)	PENALTY ONLY

Before the Court is the one remaining claim in Petitioner's Petition for Writ of Habeas Corpus. Todd Maybrown and James Lobsenz represent Petitioner. Paul Weisser and Donna Mullen represent Respondent. Having reviewed the entire record, and being fully advised in this matter, **It Is Hereby Ordered** that Petitioner's Petition for Writ

of Habeas Corpus is **Conditionally Granted Concerning Penalty Only** for the following reasons.

I. Factual and Procedural Background

On June 25, 1993 a jury convicted Pirtle of two counts of first degree murder with aggravating circumstances. A special sentencing hearing was then held, after which the jury had the responsibility to exercise the difficult moral judgment in determining whether Pirtle should receive the death penalty. The jury unanimously answered the special sentencing questions yes, and on July 18, 1993, Pirtle was sentenced to be executed. Pirtle's conviction and sentence was affirmed by the Washington Supreme Court on October 12, 1995, which denied Pirtle's Motion for Reconsideration on January 19, 1996. The Washington Supreme Court denied Pirtle's Personal Restraint Petition and his

Motion for Reconsideration of that decision was denied on December 7, 1998.

On May 5, 1999, Petitioner filed his First Amended Petition for Writ of Habeas Corpus in this court and thereafter the State supplied the court with the State court record of Pirtle's trial. On November 24, 1999, this court entered a Memorandum Opinion dismissing Petitioner's Petition based on claims 5, 9, 10, 11, 12, 13, 14, 15, 16, and 17 and reserved ruling on Petitioner's claims 1, 2, 3, 4, 6, 7, and 8. (Ct. Rec. 41). Supplemental briefs were filed and reviewed by the court.

On August 10, 2000, the court entered an Order granting in part Petitioner's Motion for Leave to Conduct Discovery only as to his claims arising out of the introduction into evidence of the non-Mirandized "you might as well shoot me now" statement in both the guilt and penalty phases of

Petitioner's trial. (Ct. Rec. 47). The court found none of the other claims in Petitioner's Petition had merit. A telephonic conference was held on October 9, 2000 and counsel for Petitioner were directed to notify the court when discovery was completed and indicate whether they felt the need for an evidentiary hearing. Counsel did so. Following discovery on the "shoot me now" claim, counsel filed further briefs and Petitioner moved to expand the record. On March 5, 2001, the court granted the motion to expand the record, rejecting Respondent's argument that an evidentiary hearing was necessary before the record could be expanded, finding that any need for an evidentiary hearing had been obviated by the completion of discovery. (Ct. Rec. 68). Respondent then supplemented the expanded record with cross designations of depositions which had been taken during discovery. (Ct. Rec. 68). The

briefing concluded on April 2, 2001. The court has now reviewed the entire expanded record.

The factual background of this case has been described in detail in previous Opinions of this court, narrowing Petitioner's Petition for Writ of Habeas Corpus down to basically one claim, and those facts need not be repeated here. The only facts necessary to set forth herein are those surrounding Pirtle's arrest on May 17, 1992, when, without any advisement of rights and while in police custody, Pirtle was asked if he knew why he was under arrest, to which he answered "Of course I do, you might as well shoot me now". This challenged "shoot me now" statement was not disclosed to counsel for the Defendant, despite the trial court's Pretrial Order requiring disclosure of all admissions or statements of the Defendant. This "shoot me now" statement was introduced into evidence and argued

by the prosecution in both the guilt and penalty phases of the trial. The treatment of the "shoot me now" issue by Pirtle's counsel, the prosecution, and by the Washington Supreme Court is the issue now before the court. The following relevant facts are not in dispute.

On May 17, 1992, following the brutal murder of two young employees of a Burger King Restaurant in Spokane, Washington, members of the Spokane County Sheriff's Department learned that the chief suspect Petitioner Blake Pirtle was staying in a motel room in the Trade Winds Motel in Spokane along with a woman.

Detective Patrick Bunch, Deputy Sheriff Cal Walker, and Sgt. Ron Ethridge were stationed on the third floor of the motel directly across the hall from Pirtle's room. The officers were not in uniform, but were carrying guns. When Pirtle exited his room and

stepped into the hall, all three officers exited their motel room with their guns drawn and pointed at Pirtle, and loudly yelling that they were police and that Pirtle was under arrest. Deputy Walker tackled Pirtle, and forced him face down on the floor, holding a knee to Pirtle's back and placed handcuffs on Pirtle. Detective Bunch was "kneeled on the ground basically in front of Pirtle at his waistline and controlling the middle part of his body", and had a gun pointed at Pirtle's torso, while Sgt. Ethridge kept his gun pointed at Pirtle's head and told Pirtle that if Pirtle did not cooperate, Sgt. Ethridge would blow him away. "I remember I had my gun drawn and I was standing to the left side of Pirtle and Deputy Walker, and I had my gun pointed down at Blake Pirtle's head." *Deposition of James Ronald Ethridge*, (Ct. Rec. 74, ex. 2, p. 9) "So when we take down someone with guns and you are saying you are

going to blow their head off if they don't cooperate, they don't always know you are the police." *Id.* at p. 12.

> Q. So when you say "takedown," do you mean physically taken down to the floor?
>
> A. Absolutely physically, yeah.
>
> Q. Who took him down to the floor?
>
> A. Again, I think it was Deputy Walker. They both could have been acting in unison, Bunch and Walker, but I think it was Walker who had spun him.
>
> Q. And did they take him face down to the floor?
>
> A. Yes, sir.
>
> Q. And was Pirtle on his stomach or his knees or what?
>
> A. Stomach.
>
> Q. And where was Walker when Pirtle went down to his stomach?
>
> A. I recalled that he was off to Pirtle's left side. I think he had -- Walker had his right knee in the small of Pirtle's back, and I remember him cranking on his left arm

pulling the arm back. This is what I think I remember.

Q. Did Pirtle resist in any way?

A. No. He didn't fight or scream or holler. He hadn't said anything. . . . .

Q. And who was the one who handcuffed him?

A. Truly, it could have been either of the two . . .

Q. When they were handcuffing him, what were you doing?

A. I was standing above Pirtle, had my gun pointed at his head.

. . .

Q. . . . did any of the three officers that were in that room announce that they were police as they came on to Pirtle?

A. I am sure we were all screaming it.

. . .

Q. And how about "you are under arrest", did anyone say that?

A. Yes, I think. I think both of those two guys did, Bunch and Walker.

Q. Loud enough for you to hear?

A. I think you probably heard it all the way down the hall of the hotel.

. . .

Q. While Pirtle was on the floor in that hallway did anybody read him his *Miranda* rights.

A. On the floor? No, sir.

. . .

Q. Is it your memory that both Cal Walker and Pete Bunch had their hands on Pirtle when he made the statement?

A. Yes, sir.

Q. And when he made the statement, you would have been pointing the gun towards Pirtle's head?

A. Yes, sir.

Q. You said something earlier in answering one question to the effect that "if you don't cooperate, I am going to blow you away," or words to that effect. Do you recall saying that?

A. Today?

Q. Yes.

A. Yes, sir.

Q. Is that the type of statement that you would make during the arrest process?

A. Virtually all the time. It is shock value. We just do it for the shock.

Id. at 322-35.

Two other law enforcement officers, Detective Madsen and Detective Knechtel, also in plain clothes and carrying guns, came up to the third floor from the second floor with their guns drawn. By this time, Pirtle was flat on his stomach, with Deputy Bunch holding his midsection and holding a gun to Pirtle's torso. Deputy Walker's knee was in Pirtle's back, Sgt. Ethridge's gun pointed at Pirtle's head. No *Miranda* warnings were given. Deputy Walker first asked if Pirtle knew he was under arrest. Pirtle replied "yes". Deputy Walker then asked Pirtle if he knew why he was under arrest. Pirtle replied "Of

course I do, you might as well shoot me now." The foregoing facts are undisputed.

None of the arresting officers included Pirtle's "Shoot me now" statement or the coercive surrounding circumstances in their police reports. Pirtle's trial attorneys did not interview the arresting officers to ask if Pirtle had made any statements at the time of his arrest. The statement was never revealed to anyone and no voluntariness or *Miranda* hearing was ever held concerning the statement.

During the guilt phase of Pirtle's trial, Deputy Walker was called as a rebuttal witness to testify as to Pirtle's appearance at the time of his arrest. Deputy Walker testified:

> At the time that I took Pirtle to the floor and pulled his hands around from underneath him and to the back, he didn't resist at all and brought his hands behind him, placed handcuffs on him and told him at that time who I

> was. I asked him if he knew he was under arrest, and while he was laying on his stomach in the hallway, I slightly rolled him up to start searching him. I started with the left side of him, and he looked back at me smiled and indicated that he knew he was under arrest. I asked him if he knew why, and he stated 'Of course I do, you might as well shoot me now.'

State Court Record, Vol. 5, p. 2607.

Defense counsel did not object and did not cross-examine Deputy Walker. As previously noted, Pirtle had not been advised of his *Miranda* rights before the question "Do you know why you are under arrest" was asked, and no voluntariness hearing concerning the statement "Of course I do, you might as well shoot me now" had been held. During the State's final closing argument in the guilt phase, the prosecutor argued that Pirtle's statement to Walker was evidence that Pirtle was not having a brain seizure at the time of the murders because if he

were, he would have gone into a seizure when he was jumped and brought to the ground by police officers.

> What would be more startling in a stressful moment than being arrested with a bunch of police jumping on you? And he had admittedly been using a large quantity of drugs with Karen Roseboom that afternoon. No resistance, nothing. Just lookin' up with an eerie smile, says, Yeah, I know what I did. You might as well shoot me right now. That does not indicate an anmesiatic psychotic episode, psychosis. That indicates an individual who knew exactly what he had done.

State Court Record, Vol 5, pp 2786-2787.

Again, no objection was made.

Following Pirtle's conviction of two counts of first degree murder with aggravating circumstances, a special sentencing proceeding was held. During this penalty hearing, which required the jury to consider whether or not to impose the death penalty the prosecutor argued to the jury "Remorse? Smiling? You might as well shoot me now? Do you

think he thought that police officer was going to shoot him? *State Record* Vol. 5 p.3016. Once again, defense counsel did not object, and the "shoot me now" statement was before the jury through the testimony and argument of the prosecution while the jury deliberated on the moral judgment of whether to impose the death penalty. Washington law prevents the imposition of the death penalty if even one juror opposes its imposition. *See pp 26-27, infra,* and *Mak v. Blodgett*, 970 F.2d 614, 621 (9th Cir. 1992). The jury answered yes to the special sentencing issue of whether to apply the death penalty. Pirtle was sentenced to death on July 18, 1993.

Pirtle appealed his conviction and sentence directly to the Washington Supreme Court, which affirmed the conviction and sentence. *State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995). A petition for *writ of certiorari* was denied by the United States

Supreme Court. *Pirtle v. Washington*, 518 U.S. 1026 (1996).

The issue of the "you might as well shoot me now" statement was first raised in Pirtle's Washington State Personal Restraint Petition, which raised fourteen (14) different claims in all. Pirtle claimed, **inter alia**, that (1) it was prosecutorial error to not disclose to the defense Pirtle's "you might as well shoot me now" statement in violation of Washington discovery rules and in violation of Pirtle's due process rights; (2) it violated Pirtle's due process rights to introduce a previously undisclosed, involuntary, and non *Miranda* statement without holding a voluntariness hearing or evaluation of the prejudicial impact of the statement; and (3) Pirtle received ineffective assistance of counsel in handling Deputy Walker's testimony during trial, as well as ineffective assistance of counsel on appeal for not

raising any issue concerning the statement. Counsel also moved for discovery and an evidentiary hearing. On October 1, 1998, the Washington Supreme Court denied the Personal Restraint Petition and denied the motions for discovery and evidentiary hearing. *In the Matter of the Personal Restraint Petition of Blake Pirtle*, 136 Wn.2d 467, 965 P.2d 593 (1998).

The Washington Supreme Court held that the State did not violate Washington discovery rules and it was not a violation of Pirtle's due process rights to not disclose Pirtle's statement to the defense, or to fail to hold a voluntariness hearing because "Pirtle ignores the fact that the State had no knowledge Deputy Walker would mention this previously unknown statement in his testimony." The Court further held that Pirtle was not being interrogated, rather that Deputy Walker was only asking background booking questions, where "*Miranda*

warnings are not applicable." Finally, the Court held that Pirtle had not received ineffective assistance of counsel at trial because there was no evidence that interviewing Deputy Walker would have triggered his memory, the failure to impeach Walker did not violate Pirtle's rights because that failure did not fall below Sixth Amendment standards, and that his claim that the assistance of his appellate counsel was ineffective must fail because "[s]ince we find no error in Deputy Walker's testimony, under any approach, Pirtle's argument fails."

Pirtle's Petition for Writ of Habeas Corpus was timely filed in this court on May 5, 1999, after the effective date of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. section 2254(d)(1) effective April 24, 1996. All of Pirtle's claims in his Petition for Writ of Habeas Corpus other than those concerning the "you might as well

shoot me now" statement have previously been dismissed, and the court has allowed and considered discovery surrounding the "you might as well shoot me now" statement, bringing to light for the first time the coercive circumstances that existed at the time Pirtle made the "you might as well shoot me now" statement. The Petitioner's earlier request for an evidentiary hearing was withdrawn.

II. The AEDPA Standard of Review

It cannot be disputed that in passing the AEDPA, Congress rendered it more difficult for prisoners in general, and particularly capital defendants to receive collateral relief by way of habeas corpus. However, the existence of new statutory restrictions does not mean that federal habeas review has been eliminated, even for capital defendants. Nothing in the AEDPA requires federal courts to turn a blind eye to State proceedings or to

rubberstamp them. Rather the application of AEDPA simply requires a more refined approach in considering a petition for writ of habeas corpus.

Under 28 U.S.C. section 2254(d)(1), this court may reverse a decision of the Washington Supreme Court denying Pirtle relief only if that decision is (1) "contrary to" or "involves an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States" or (2) was based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. Section 2254(d)(1)(2); *Williams v. Taylor*, 529 U.S. 362 (2000).

As explained in Justice O'Conner's opinion for the Court in *Williams, supra,* a State court acts contrary to clearly established federal law if it applies a legal rule that contradicts prior Supreme

Court holdings or if it reaches a different result from a Supreme Court case despite confronting indistinguishable facts. The statute also authorizes federal habeas corpus relief if, under clearly established federal law, a State court has been unreasonable in applying the governing legal principle to the facts of the case. "A state determination may be set aside under this standard if, under clearly established federal law, the State court was unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled." *Ramdass v. Angelone*, 530 U.S. 156, 164 (2000). A State court's decision can involve an "unreasonable application" of controlling law if it either (1) correctly identifies the governing rule but then applies it to a new set of facts in a way that is objectively unreasonable, or (2) extends or fails to extend a clearly established legal

principle to a new context in a way that is objectively unreasonable. *Williams, supra* at 362.

The Supreme Court need not have addressed a factually identical case. Rather it is only required that the Supreme Court clearly determined the law. *Houston v. Roe*, 177 F.3d 901, 906 (9th Cir. 1999), *cert denied*, 528 U.S. 1159 (2000).

State court judgments "must be upheld unless, after the closest examination of the State-court judgment, a federal court is firmly convinced that a federal constitutional right has been violated." *Williams, supra* at 387. Simply stated, a federal court should not issue the habeas writ unless the State court was wrong as a matter of clearly established Supreme Court law or was unreasonable in its application of clearly established Supreme Court law to the facts of a particular case.

Pirtle claims he was denied his constitutionally guaranteed rights to due process and right against self-incrimination concerning the admission of Pirtle's "shoot me now" answer to the question posed by Deputy Cal Walker at the time of Pirtle's arrest, while Pirtle was in custody without having been given any warnings as required by *Miranda v. Arizona*, 384 U.S. 436 (1966) and without having been given a voluntariness hearing as required by *Jackson v. Denno*, 378 U.S. 368 (1964). Pirtle also claims he was denied his right to effective representation under *Strickland v. Washington*, 466 U.S. 668 (1984) because his trial counsel neither conducted discovery to learn of the statement nor cross-examined Deputy Walker about the statement, and his appellate counsel did not raise any issue concerning the "you might as well shoot me now" statement on direct appeal.

The initial inquiry under the AEDPA is whether Pirtle seeks to apply rules of law that were clearly established at the time his State-court conviction became final. Pirtle's State-court conviction became final on December 29, 1998, when the Washington Supreme Court issued its Certificate of Finality. This question is easily answered because the merits of Pirtle's claim are governed by clearly established Supreme Court holdings that pre-dated Pirtle's final conviction. Therefore, the inquiry becomes whether the Washington State Supreme Court decisions as to Pirtle's constitutional claims either were contrary to a clearly established Supreme Court ruling or unreasonably failed to apply a clearly established Supreme Court holding to the facts of this case. This court is firmly convinced that the Washington State Supreme Court' decisions that Pirtle's Due process, Fifth Amendment, and

Sixth Amendment rights were not violated were either contrary to or an unreasonable application of clearly established federal law as held by the United State Supreme Court.

1. Failure to Advise Pirtle of Miranda Rights

It is not disputed that at the time of Pirtle's arrest, three law enforcement officers were yelling at him, and while he was being held face down on the ground and handcuffed, with a law enforcement officer's knee in his back, a police officer with a gun to his torso, and another law enforcement officer holding a gun to his head and threatening to blow Pirtle away if he did not cooperate, Deputy Cal Walker asked Pirtle if he knew why he was under arrest. Pirtle answered, "Of course I do, you might as well shoot me now." It is also undisputed that Pirtle had not been advised of his *Miranda* rights at this time. Neither is it disputed that no

voluntariness hearing was ever held or that this "shoot me now" statement was not disclosed to anyone, until testified to by Deputy Walker, nor is it disputed that the testimony concerning the custodial statement was unchallenged by the defense attorney at trial, was argued to the jury in both the guilt and penalty phases, and that the issue was not raised on direct appeal.

The law governing the admission of confessions first developed in the common law in first the courts of England and then early decisions of the United States Supreme Court which recognized that coerced confessions are inherently untrustworthy. *See e.g. King v. Rudd*, 1 Leach 115, 117-118, 122-123, 168 Eng. Rep. 160, 161, 164 (K.B. 1783) (Lord Mansfield, C.J.) (Stating that the English courts excluded confessions obtained by threats and promises); *King v. Warickshall*, 1 Leach 262, 263-

264, 168 Eng. Rep. 234, 235 (K.B. 1783) ("A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt . . . but a confession forced from the mind by the flattery of hope or by the torture of fear, comes in so questionable a shape . . . that no credit ought to be given to it; and therefore it is rejected.") *See also Hopt v. Territory of Utah*, 110 U.S. 574 (1884); *Pierce v. United States*, 160 U.S. 355 (1896).

Over time, the United States Supreme Court recognized two constitutional bases for the requirement that a confession must be voluntary in order to be admitted into evidence: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fifth and Fourteenth Amendment. *Dickerson v. United States*, 530 U.S. 428, 432 (2000).

The Self-Incrimination Clause of the Fifth Amendment provides that no "person . . . shall be compelled in any criminal case to be a witness against himself. In *Malloy v. Hogan*, 378 U.S. 1, 1964, the Court held that the Fifth Amendment's Self-Incrimination Clause is incorporated into the Due Process Clause of the Fourteenth Amendment, and therefore applies to the States.

The privilege "protects an accused from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." *Schmerber v. California*, 384 U.S. 757, 761 (1996). In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court reaffirmed its previous understanding that the privilege against self-incrimination protects individuals not only from legal compulsion to testify in a criminal courtroom but also from "informal compulsion exerted by law-

enforcement officers during in-custody questioning", and that therefore, prior to any custodial questioning, a suspect must be provided with procedural safeguards before a suspect's statement made during custodial interrogation could be admitted into evidence. *Id.* at 479-481. The court noted that the advent of modern custodial police interrogation brought with it an increased concern about confessions obtained by coercion. Because custodial police interrogation, by its very nature, isolates and pressures the individual, the Court stated that "[e]ven without employing brutality, the 'third degree' or [other] specific stratagems, . . . custodial interrogation exacts a heavy toll on individual liberty and trades on the weaknesses of individuals.' *Id.* at 455.

The Court in *Miranda* concluded that the coercion inherent in custodial interrogation blurs the

line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be "accorded his privilege under the Fifth Amendment . . . not to be compelled to incriminate himself." *Id.* at 4442. Therefore, the Court established guidelines and held that the admissibility in evidence of any statement given during custodial interrogation of a suspect would depend on whether the police had provided the suspect with four procedural warnings, which have come to be known as the *Miranda* warnings.

Thus, under *Miranda*, any statement by a suspect, whether exculpatory or inculpatory, stemming from custodial interrogation of a defendant must be suppressed unless the police provide the four procedural safeguards to secure the privilege against self-incrimination.

Custodial interrogation means questioning initiated by law enforcement officers reasonably likely to elicit an incriminating response after a person has been taken into custody or otherwise deprived of his or her freedom of action in any significant way. *Id.* at 443. Thus, the question of whether *Miranda* warnings are necessary depends on (1) whether the defendant is in custody and if so (2) whether he has been subject to questioning by law enforcement officers reasonably likely to elicit an incriminating response.

In *Dickerson v. United States*, 530 U.S. 428 (2000), the Supreme Court held that *Miranda* is a constitutional based decision that even Congress may not supersede legislatively. *Id.* Therefore, *Miranda* requirements were not superseded by passage of the AEDPA.

Here, it is not disputed that Pirtle was in custody when Detective Walker asked "do you know why you are under arrest?", to which Pirtle answered "Of course I do, you might as well shoot me now." The only question is whether the Washington Supreme Court unreasonably determined that Deputy Walker was not interrogating Pirtle, but rather was just asking background booking questions. In so finding, the Washington Supreme Court recognized the controlling authority of *Miranda* but found it did not apply to these facts citing only to three Washington decisions: *Washington v. Bradley*, 105 Wn.2d 898; 719 P..2d 546 (1986); *Washington v. Franklin*, 48 Wn. App. 61, 737 P.2d 1047 (1987); and *Washington v. Walton*, 64 Wn. App. 410, 824 P.2d 533 (1992). The Washington Supreme Court did not discuss or apply applicable decisions of the United States Supreme Court on

"interrogation", discussed, *infra*. This court finds that the Washington Supreme Court erred and unreasonably failed to apply the holding in *Miranda* to the facts of this case. That Court also failed to consider applicable decisions of the United States Supreme Court.

In *Pennsylvania v. Muniz*, 496 U.S. 582 (1990), the United States Supreme Court addressed the difference between routine booking questions, which are not subject to *Miranda*, and questions intended to elicit information for investigatory reasons, which are subject to *Miranda*. In *Muniz*, the defendant was arrested for driving under the influence of alcohol. Without giving any *Miranda* warnings, a police officer first asked the defendant questions concerning the defendant's name, address, height, weight, eye color, date of birth, and current age. The court found that these questions were

admissible without the protections of *Miranda* because they were routine booking questions requested for record keeping purposes only. However, the Court distinguished these questions from the final question in which the police officer asked the defendant if he knew the date of his sixth birthday. The Court found the defendant's response was testimonial and that *Miranda* required the answer to be suppressed.

> Whenever a suspect is asked for a response requiring him to communicate an express or implied assertion of fact or belief, the suspect confronts the 'trilemma' of truth, falsity, or silence, and hence the response (whether based on truth or falsity) contains a testimonial component.

Id. at 597.

> When Officer Hosterman asked Muniz if he knew the date of his sixth birthday and Muniz, for whatever reason, could not remember or calculate that date, he was confronted with the trilemma. By hypothesis, the inherently coercive environment created by the custodial

> interrogation precluded the option of remaining silent. . . . Muniz was left with the choice of incriminating himself by admitting that he did not then know the date of his sixth birthday, or answering untruthfully by reporting a date that he did not believe was accurate. . . .

Id. at 598-599.

> The Commonwealth's protest that it had no investigatory interest in the actual date of Muniz's sixth birthday, . . . is inapposite. The critical point is that the Commonwealth had an investigatory interest in Muniz's assertion of belief that was communicated by his answer to the question. . . The incriminating inference stems from the then-existing contents of Muniz's mind as evidenced by his assertion of his knowledge at that time.

Id. at 599, n. 13. The *Muniz* case was not cited or discussed by the Washington Supreme Court.

Here, it is clear that when Deputy Walker asked Pirtle if he knew why he was under arrest the circumstances were not in a "booking setting". Walker had an investigatory interest in Pirtle's assertion of belief that he admitted and knew what

he had done. Pirtle's belief that he deserved to die for his acts was clearly communicated by his answer to the question. The inherently coercive environment created by being held face and stomach down on the ground with a gun pointed at his head and under a threat of being shot if he didn't cooperate, precluded the option of remaining silent leaving Pirtle with the choice of incriminating himself or answering untruthfully. He was not advised of his option of remaining silent.

In *Rhode Island v. Innis*, 446 U.S. 291 (1980), likewise not discussed by the Washington Court, the Supreme Court held that *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. "That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the

part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."

> By 'Incriminating response' we refer to any response-whether inculpatory or exculpatory-that the *prosecution* may seek to introduce at trial. As the Court observed in *Miranda*: 'No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination.

Id. at 299. The State argues that the intent of the question "Do you know why you are under arrest" was not to elicit an incriminating response, but rather was just to ensure that Pirtle knew he was under arrest. However, the *Innis* inquiry "focuses primarily upon the perceptions of the suspect, rather than the intent of the police." *Id.* at 291.

It is clear that Pirtle knew he was under arrest at the time the question was asked. Pirtle had been thrown to the ground at gunpoint, with the officers yelling loudly that they were police and that he was under arrest. Pirtle was held there face down and handcuffed, one gun pointed at his torso, and another gun pointed at his head, and under a threat of being shot if he did not cooperate. Deputy Walker then asked Pirtle "Do you know why you are under arrest, to which Pirtle answered "Of course I do, you might as well shoot me now."

Miranda serves to guard against "the unreliable statements at trial." *Johnson v. New Jersey*, 384 U.S. 719, 730 (1966). The *Miranda* Court made it clear that the basis for its decision was the need to protect the fairness of the trial itself. *Withrow v. Williams*, 507 U.S. 680, 690 (1993).

The Washington Supreme Court recognized that *Miranda* was controlling authority, but did not refer to any United States Supreme Court authority in finding that Pirtle was not the subject of interrogation, rather relying only on three Washington cases, the facts and conclusions of which do not support the Washington Supreme Court finding and conclusions in this case.

Washington v. Bradley, 105 Wn.2d 898; 719 P.2d 546 (1986) involved a border search, where the defendant was given *Miranda* warnings and invoked the right to have an attorney appointed. While an officer was filling out personal history forms, the defendant, without being asked any questions, stated "You sure are making a big deal out of a little bit of coke." The officer then asked the defendant about marijuana, and the defendant replied that "they had just finished their last joint before they pulled up to

the border." The court found that the defendant's first statement about the coke was made voluntarily while the defendant was being questioned about his personal history, and was therefore admissible. However, the court found that the second statement was not admissible because it was made in response to the officer's question about marijuana.

In *Washington v. Franklin*, 48 Wn. App. 61, 737 P.2d 1047 (1987) the defendant, who had recently been taken into custody and advised of his *Miranda* rights, voluntarily approached a detective, who then asked the defendant if he understood what he had been charged with in Washington. The defendant said that "he was surprised to see that he was wanted for murder, and . . . that this was not right, because he was guilty of robbery, but not murder, since he had not killed anyone." The defendant was given a voluntariness hearing

concerning his statements and his statements were ruled admissible since they were **voluntarily made after he had been properly advised of his *Miranda* rights.**

In *Washington v. Walton*, 64 Wn. App. 410, 824 P.2d 533 (1992), the officer asked the defendant of his address prior to any *Miranda* warnings. The court found that routine information necessary for basic identification purposes is not interrogation. **"Only if the agent should have reasonably known the information sought was directly relevant to the offense will the request be subject to scrutiny."** *Id.* at 413. (Emphasis added).

Here the question asked by Deputy Walker of Pirtle had nothing to do with routine information, such as name, address, height, weight, age. Rather, the question was directly relevant to the offense, *i.e.*

"Do you know why you are under arrest?" Like the situation in *Muniz*, supra, the State had an investigatory interest in Pirtle's assertion of belief that was communicated by his answer to the question that he knew why he was under arrest and should be shot for what he had done. The incriminating inference stems from the then-existing contents of Pirtle's mind as evidenced by the assertion of his knowledge at that time.

Therefore, this court finds that the Washington Supreme Court finding that no *Miranda* warnings were necessary, because Deputy Walker's question was allegedly a routine booking question, is directly contrary to controlling authority as determined by the United States Supreme Court in *Muniz*, and *Innis* supra. The court is further firmly convinced that the Washington Supreme Court decision that Pirtle's Fifth and Fourteenth

Amendment rights were not violated by the admission of his statement without having been given the benefit of *Miranda* warnings unreasonably refused to extend the governing legal principle of *Miranda* to the facts of this case.

2. Failure to Disclose Pirtle's Statement and Failure to Hold Voluntariness Hearing

In addition to the fact that Pirtle's "shoot me now" statement was admitted into evidence, even though the statement came from a custodial interrogation without the benefit of any *Miranda* warnings, the police officers did not include any mention of the statement or surrounding coercive circumstances in any police report. This information was not disclosed to anyone prior to trial to allow for any kind of voluntariness hearing concerning the statement prior to it being admitted into evidence. The police officers have testified by deposition and/or

affidavit that they did not consider the statement to be important enough to include in a police report. However, this claim is belied by the fact that obviously Deputy Walker found it important enough to testify about it at trial, and the prosecutor found it important enough to include it in argument both on guilt and the death penalty.

The Washington Supreme Court found that Pirtle's rights were not violated by the failure to disclose Pirtle's statement to the defense or the failure to hold a voluntariness hearing because the Court found that the State did not know of the statement. Again, this court finds that the Washington Supreme Court erred and unreasonably failed to apply clearly established United States Supreme Court precedent to the facts of this case.

Due Process imposes an obligation upon the prosecution to ensure that a Defendant receives a

fair trial. Recognizing this to be the case, the United States Supreme Court has clearly held that knowledge of police officers is imputed to the prosecution.

"[It may be said that no one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that "procedures and regulations can be established to carry the prosecutor's burden and to insure communication of all relevant information on each case to every lawyer who deals with it." *Kyles v. Whitley*, 514 U.S. 419, 438 (1995) (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972)). [A]ny argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters

of the Government's obligation to ensure fair trials." *Id.*

"Whether nondisclosure is a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government." *United States v. Endicott*, 869 F.2d 452 (9th Cir. 1995), (citing *Giglio v. United States*, 405 U.S. 150 (1972). "Since the investigative officers are part of the prosecution, the taint on the trial is no less if they, rather than the prosecutor, were guilty of nondisclosure. Indeed, it is the character of the evidence, not the character of the prosecutor, that determines whether nondisclosure constitutes constitutional error." *Id.* (citing *United States v. Agurs*, 427 U.S. 97, 110 (1976).

Here, the character of the evidence that was admitted, without any prior disclosure or *Miranda*

warnings, was that of a coerced confession. However, the Washington Supreme Court did not recognize the clearly established holding in *Jackson v. Denno*, 378 U.S. 368 (1964) in finding that Pirtle's rights were not violated due to the lack of disclosure and lack of a voluntariness hearing.

The United States Supreme Court in *Jackson v. Denno*, 378 U.S. 368 (1964), held that a defendant's right to be free of conviction or imposition of the death penalty based on a coerced confession requires a State court hearing on the question of voluntariness of the confession, and that the failure to give a defendant such a hearing violates a defendant's due process rights under the Fourteenth Amendment.

> The case of a confession induced by physical or mental coercion deserves special attention. . . . A fair consideration of the evidence upon the preliminary question is essential. ; in this consideration the truth or untruth

> of the confession is immaterial . . . Due process of law requires that a coerced confession be excluded from consideration by a jury. It also requires that the issue of coercion be tried by an unprejudiced trier. . .

Id. at 382.

In addition to requiring procedural warnings before a defendant can be subjected to custodial interrogation, *Miranda* refers to the "inherent pressures of the interrogation atmosphere." *Miranda, supra*, 384 U.S. at 468. The purpose of the admonitions is to combat what the Court saw as "inherently compelling pressures at work on the person and to provide him with an awareness of the Fifth Amendment privilege and the consequences of foregoing it." *Id.* at 467, "The purposes of the safeguards prescribed by *Miranda* are to ensure that the police do not coerce or trick captive suspects into confessing." *Berkemer v. McCarty*, 468 U.S. 420, 433 (1984), "The relinquishment of the right protected by

the *Miranda* warnings must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

"[T]he mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents." *United States v. Henry*, 447 U.S. 264, 274 (1980). "Custody works to the State's advantage in obtaining incriminating information. The psychological pressures inherent in confinement increase the suspect's anxiety . . . *Illinois v. Perkins*, 496 U.S. 292, 304 (1990). One cannot imagine any more anxiety ridden situation, regardless of whether a person has committed an egregious offense, than being thrown and held on the ground with a gun

pointed at one's head and a police officer threatening to "blow you away" if you don't cooperate.

This court finds that Pirtle's Due Process rights as well as his right against self-incrimination under the Fifth Amendment were violated and that his statement cannot be classified as a voluntary statement, under the circumstances under which the statement was made. To find that a person's statement made while being held face down on the ground, with guns pointed at his head, and under a threat of death for not cooperating with the authorities was voluntary would clearly be contrary to controlling authority as determined by the United States Supreme Court. The uncontradicted facts lead to the inescapable conclusion that Pirtle's statement to Walker was not voluntarily made and the holding of the Washington Supreme Court that no disclosure of the confession or voluntariness

hearing was required because the State did not know about the statement completely contradicts prior Supreme Court holdings, as discussed *supra*.

3. Ineffective Assistance of Counsel

Pirtle argued to the Washington Supreme Court that it was ineffective assistance of counsel for his trial counsel not to do any discovery concerning the custodial interrogation, and for failing to impeach Deputy Walker for failing to mention the statement in his police report and that it was also ineffective assistance of appellate counsel for not raising the issue on Pirtle's direct appeal. The Washington Supreme Court found that it was not ineffective assistance to forego any discovery concerning the statement because "there are no facts to support the argument that interviewing Deputy Walker would have triggered his memory and made Pirtle's counsel aware of this evidence." As to the

failure to impeach claim, the court stated "Any failure of Pirtle counsel to impeach Deputy Walker does not fall below Sixth Amendment standards, citing *Strickland v. Washington*, 466 U.S. 668 (1984). As for the claim that it was ineffective assistance to not raise the issue on direct appeal, the Court simply stated that "Since we find no error in Deputy Walker's testimony, under any approach, Pirtle's argument fails."

I am firmly convinced that the Washington Supreme Court erred and failed to reasonably apply the holding of *Strickland* to the facts of this case. The Sixth Amendment right to the effective assistance of counsel "is fundamental and essential to fair trials. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). *See also Evitts v. Lucey*, 469 U.S. 387 (1985).

The applicable law which guides an examination of the effectiveness of counsel is supplied by *Strickland v. Washington, supra*, 466 U.S. 668 (1984), which, like *Miranda*, and *Jackson* is clearly established Federal law. Under *Strickland*, Pirtle must first show that his counsel's performance was deficient in a way that fell below an objective standard of reasonableness. *See Strickland* at 687-88. Second he must show he was prejudiced by the deficient performance to such an extent that the resulting proceedings were unreliable. *See Id.* at 687. Applying that analysis, this court finds that the State court erred in concluding that Pirtle received effective assistance of counsel concerning the "you might as well shoot me now" statement within the meaning of *Strickland* and that error was objectively unreasonable.

Although there is a strong presumption that an attorney's conduct meets the standard for effectiveness, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 690. Under "Strickland", in addition to showing that counsel's performance fell below an objective standard of reasonableness, a petitioner must establish a "reasonable probability that, but for counsel's unprofessional errors the result of the proceeding would have been different," where a reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.*

Here, at the time Pirtle was arrested, he was placed into custody in a very coercive environment, and was interrogated as to whether he knew why he was under arrest, without having received any warnings as required by *Miranda*. Neither Pirtle's

statement nor the coercive circumstances surrounding the statement were ever revealed to anyone. Pirtle's trial counsel made no effort to interview the police officers about any statement Pirtle had made or the surrounding circumstances at the time of his arrest. Pirtle's answer to the custodial question was admitted into evidence, without any objection or cross-examination and argued by the prosecutor both during the guilt and death penalty phases of Pirtle's trial without any objection by Pirtle's counsel and without having had any voluntariness hearing concerning the statement. Additionally, appellate counsel for Pirtle failed to raise any issue concerning the "Why don't you shoot me now" statement on direct appeal. The court finds that this lack of diligence by both trial counsel and appellate counsel fell below an objective standard of reasonableness constituting deficient performance

by counsel. Therefore the issue becomes whether Pirtle has established a reasonable probability sufficient to undermine confidence in the outcome of either the guilty verdicts or the death penalty imposed, but for counsel's errors.

As for the verdicts of guilty at the end of the guilt phase of Pirtle's trial, I cannot find a reasonably probability that but for Pirtle's counsel's deficiencies, and the admission of Pirtle's statement, the guilty result would have been any different. The evidence against Pirtle was extremely strong during the trial, including his own testimony as to his commission of the murders, and how he tried to cover up the crimes he had committed. There was more than enough evidence, other than that of Pirtle's custodial statement, for a jury to find that Pirtle had a motive for the killings and that he premeditated the murders.

However, this court finds that the failure of counsel inquire about any statements, the failure to object to the testimony and argument concerning the non *Miranda* statement of Pirtle that "you might as well shoot me now" and the failure to raise on direct appeal the constitutional issues that this court has found to have merit establishes a probability sufficient to undermine the confidence in the jury's imposition of the death penalty following the penalty hearing as discussed below.

4. Harmless Error

Trial evidentiary errors, including even the admission of non *Miranda* custodial involuntary statement that violate a person's Fifth and Fourteenth Amendment rights and the failure to effectively assist a defendant in violation of the Sixth Amendment are subject to collateral review under the harmless error standard set forth in *Kotteaskos*

v. United States, 328 U.S. 750, 776 (1946), finding that collateral relief is only appropriate if "actual prejudice" resulted because a constitutional violation had substantial and injurious effect or influence in determining the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993).

A. The Guilt Phase

As noted by the Washington Supreme Court, the evidence presented during the guilt phase of Pirtle's trial clearly established both premeditation and motive.

> Pirtle, in addition to having motive for revenge for his termination from Burger King, chose to rob an establishment where he was well known and could be identified. Pirtle's actions that day . . . demonstrate premeditation.
>
> Pirtle took Dawnya into the walk-in cooler where he struck her several times in the head with two paint cans, then after she was already unconscious and lying on the floor, he cut her throat. Both Pirtle's testimony and physical evidence show Dawnya resisted the attack.

> Pirtle then talked Tod into leaving the freezer and walking to the office, telling Tod he only wanted to knock him out. He convinced Tod to take off his glasses and lie face down on the floor, whereupon he hit Tod twice with a fire extinguisher, then retrieved a knife and cut Tod's throat after he was unconscious. There were nine wounds to the front of Tod's neck and eight to the back of his neck, which could have been caused either by the knife or by a hacksaw found on Tod's body.
>
> After killing Tod, Pirtle returned to the cooler and cut Dawnya's throat some more, as Pirtle testified, 'because her body was makin' noises.' He sawed at her throat with the knife at least sixteen times, nearly decapitating her. The examining physician speculated the hacksaw also may have been used on Dawnya's neck.
>
> Following the murders, Pirtle had the presence of mind to change clothes, gather the robbery proceeds and some of the evidence into a garbage bag, bring his car to the rear of the Burger King, and load the full garbage bag into the car. He drove home, cleaned up the car and himself, and hid the evidence in a compost pile in a neighbor's yard.

Pirtle, supra, 127 Wn.2d at 645 (citation omitted).

Although Pirtle's statement to Deputy Walker should have been suppressed, the court finds the failure to do so was harmless beyond any doubt concerning the finding of guilt. Even without consideration of that statement to Walker, the evidence of Pirtle's guilt was overwhelming.

Therefore, this court cannot find that, despite the serious constitutional violations that occurred in this case, those violations had substantial and injurious effect or influence in the jury's verdict of guilty as to both counts of first degree murder with aggravating circumstances.

B. The Penalty Phase

During the penalty phase of Pirtle's trial, the jury was asked to exercise their moral judgments as to whether Pirtle should receive the death sentence, a very difficult decision that had to be unanimous. Washington Rev. Code § 10.95.060(4) provides:

> Upon conclusion of the evidence and argument at the special sentencing proceeding, the jury shall retire to deliberate upon the following question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt, that there are not sufficient mitigating circumstances to merit leniency?
>
> In order to return an affirmative answer to the question posed by this subsection, *the jury must so find unanimously.*

Mak v. Blodgett, 970 F.2d 614, 621 n. 9. (9th Cir. 1992).

Therefore, the law of Washington allows any one juror to set aside the death penalty. *Id.* at 621.

Having in mind that the prosecutor argued the inadmissible "you might as well shoot me now" statement in both the guilt and penalty phases bringing it once again to the jury's attention at the time when the jury was to make a most difficult decision whether or not to impose the death penalty, the court cannot find that no juror was influenced or

persuaded by the fact that Pirtle had acknowledged he should die for what he had done which then became a part of that juror or jurors's moral judgment analysis. One can envision very few, if any, more difficult decisions that an individual juror is called upon to make during his or her lifetime than that of whether or not to vote for the imposition of the death penalty. Certainly when one asks himself or herself if a statement by a convicted murderer that he deserves the death penalty would influence one's decision, the answer of most would be in the affirmative.

This court has grave doubts that the "you might as well shoot me now" statement did not have a substantial influence on the death sentence decision of one or more individual jurors. It is impossible to conclude that substantial rights--the difference between death and life without the

possibility of parole were not affected. As the Court in *Kotteakos, supra* admonished, "the inquiry cannot be merely whether there was enough to support the result apart from the phase affected by the error."

> If one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Kotteakos, supra, 328 U.S. at 765.

> [T]he question is, not were the jurors right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision.

Id. at 764.

Although the offenses in this case certainly were brutal enough to support the prosecution's death eligibility case, the Supreme Court in *Williams, supra*, 529 U.S. 362, recently noted that evidence unrelated to a defendant's dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death eligibility case.

This court finds that the involuntary non *Miranda* custodial statement "you might as well shoot me now" could have had a profound effect on the jury considering the penalty options. Hearing the testimony and argument concerning the Pirtle statement was a means of undercutting the jury's own sense of responsibility for imposing the death penalty, instead placing the responsibility on Pirtle's statement that he deserved to be shot for what he did. At a minimum, I have grave doubts about the

harmlessness of the error. As stated, *supra*, it is hard to imagine a more difficult moral judgment a person would ever have to make in a lifetime than that of acting as a juror on a death penalty case and deciding whether a person should be executed. Therefore this court cannot find that the testimony and argument by the prosecutor concerning the involuntary non *Miranda* "you might as well shoot me now" statement was harmless as to the death penalty imposed.

For the foregoing reasons, **It Is The Judgment of This Court** that the Washington Supreme Court decisions that no constitutional violations occurred because (1) the State did not know Deputy Walker was going to testify as to Pirtle statement that "you might as well shoot me now"; (2) Pirtle was not entitled to *Miranda* warnings because he was not being interrogated by Deputy Walker; (3)

there was no ineffective assistance of counsel for not conducting discovery about any statements made by Pirtle, not effectively cross-examining Deputy Walker about the circumstances surrounding the statement and failure to include the statement and surrounding circumstances in his police report, or for failure to raise any issue concerning the statement on appeal, because there was no error in the use of the "you might as well shoot me now" statement were contrary to or objectively unreasonable applications of controlling authority as determined by the United States Supreme Court.

It Is the Further Judgment of This Court that the constitutional errors that occurred were harmless and did not prejudice Mr. Pirtle as to the finding in the guilt phase of his trial, but did prejudice Pirtle in the special sentencing phase, and

were therefore, not harmless as to the penalty imposed.

Accordingly, **It Is Hereby Ordered** that a writ of habeas corpus shall issue commanding the State of Washington to **Vacate and Set Aside** the sentence of death in the case of The State of Washington v. Blake Pirtle of the Superior Court for the County of Spokane, No. 92-1-00955-3 unless within 90 days of the entry of judgment herein, the State of Washington grants Pirtle a new hearing on the sentencing issues without any use of his non *Mirandized* "you might as well shoot me now" statement. If the State does not elect to re-try Pirtle on the sentencing issues, the Superior Court shall **Vacate** his sentence of death and re-sentence him in accordance with applicable Washington law and the United States Constitution. The Order Staying

Execution (Ct. Rec. 12) entered on January 12, 1999 shall remain in full force and effect.

IT IS SO ORDERED. The Clerk of this Court is directed to file this Memorandum Opinion and Order, enter judgment as herein specified, and forward copies to counsel, the Clerk of the Spokane County Superior Court, and the Warden of the Washington State Penitentiary.

Dated this 25th day of June, 2001.

s/ Justin L. Quackenbush
JUSTIN L. QUACKENBUSH
SENIOR UNITED STATES DISTRICT JUDGE